

5

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 173

M. GRAHAM AND B. F. HAMPTON, PLAINTIFFS IN
ERROR,

vs.

CHARLES H. GILL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

FILED DECEMBER 15, 1909.

(21,931.)

(21,931.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 705.

J. M. GRAHAM AND B. F. HAMPTON, PLAINTIFFS IN
ERROR,

vs.

CHARLES H. GILL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

INDEX.

	Original.	Print
Caption.....	1	1
Transcript from circuit court of Lee county, Florida.....	1	1
Docket entries.....	1	1
Declaration.....	1	1
Pleas to declaration.....	2	2
Joinder of issue.....	2	2
Hearing.....	2	2
Verdict.....	3	2
Motion in arrest of judgment.....	3	3
Order overruling motion in arrest of judgment.....	4	3
Judgment.....	4	3
Bill of exceptions.....	4	3
Exhibit No. 1 offered and objections thereto.....	5	5
No. 2 offered and objections thereto.....	6	5
No. 3 offered.....	6	5
Plat offered.....	6	5
Plaintiffs' Exhibit No. 1—Certificate of Commissioner of Agriculture of the State of Flor- ida, November 6, 1905.....	6	5
No. 2—Deed No. 3127, to Hampton & Graham, October 23, 1900.....	7	6

	Original.	Print
Plaintiffs' Exhibit No. 3—Plat showing lot 1, section 8, township 44 south of range 21 east.....	8a	6
No. 4—Plat of township 44 south of range 21 east, showing the land in controversy.....	8c	6
No. 5—Transcript of field notes of certain surveys in township 44 south, range 21 east.....	8	7
Testimony of Johnny Jack.....	15	12
Testimony of J. M. Crumpton.....	17	14
Plaintiffs' Exhibit No. 6—Field notes of survey of Palmetto Key by J. M. Crumpton.....	23	18
Testimony of A. W. Taylor.....	26	20
J. M. Crumpton (recalled).....	32	25
R. B. Leak.....	33	25
Plaintiffs rest.....	33	25
Defendant's Exhibit No. 1 offered.....	33	26
Testimony of Charles H. Gill.....	33	26
Defendant's Exhibit No. 1—United States Patent to Charles H. Gill, June 25, 1901.....	34	26
Testimony of R. B. Leak (recalled for defendant).....	38	29
Plaintiffs' Exhibit No. 7—Letter of Davis & Hampton to R. B. Leak, November 4, 1905.....	42	13
Testimony of J. M. Crumpton (recalled).....	45	34
Wm. Demere.....	46	34
J. M. Crumpton (recalled).....	47	35
E. C. Corsa.....	48	36
M. Johnson.....	50	37
P. L. McAdow.....	51	38
H. A. Ware.....	52	39
R. B. Leak (recalled).....	54	40
Defendant rests.....	56	41
Testimony of A. W. Taylor.....	56	41
Testimony closed.....	57	42
Instructions asked by plaintiffs given.....	57	42
Instructions asked by defendant given.....	59	43
Instructions asked by defendant refused.....	60	44
Charge to jury.....	61	44
Motion to extend time to file motion for new trial.....	63	46
Order extending time to file motion for new trial.....	64	46
Motion for new trial.....	64	46
Order overruling motion for new trial.....	66	47
Notice to settle bill of exceptions.....	66	48
Assignment of errors.....	67	48
Judge's certificate to bill of exceptions.....	68	49
Præcipe for writ of error.....	69	49
Writ of error.....	69	50
Præcipe for transcript of record.....	70	50
Assignment of errors.....	71	51
Clerk's certificate.....	73	52

INDEX.

111

	Original.	Print
Opinion	74	53
Judgment	77	54
Petition for rehearing	78	55
Order denying petition for rehearing.....	80	56
Petition for writ of error.....	81	56
Assignment of errors	81	57
Order of chief justice of Florida denying writ of error.....	82	57
Clerk's certificate	83	58
Petition for writ of error.....	84	58
Assignment of errors	85	58
Order of Mr. Justice White allowing writ of error	87	59
Bond on writ of error.....	88	60
Citation and service.....	90	61
Writ of error.....	92	61
Return to writ of error	95	62

1 Be it remembered that on the 28th day of May A. D., 1908 at a regular term of the Supreme Court of the State of Florida came the plaintiffs in error, J. M. Graham and B. F. Hampton by counsel and filed in the clerk's office of the Supreme Court of said State a transcript of the record of the proceedings and judgment of the Circuit Court of Florida for Lee County in a certain cause wherein J. M. Graham and B. F. Hampton were plaintiffs and Charles H. Gill was defendant, which said transcript of the record aforesaid and subsequent proceedings to final judgment therefrom is in the words and figures, to-wit:

Transcript of Record of Proceedings in the Circuit Court of Lee County, Florida, in the Suit of J. M. Graham and B. F. Hampton, Plaintiffs, Against Charles H. Gill, Defendant, Therein Pending.

On the 10th day of April A. D., 1905, the plaintiffs filed their praecipe for summons ad respondendum.

On said date summons ad respondendum issued.

On April 19th, 1905, service of summons was made on the defendant.

On the 1st day of May, 1905, the defendant appeared.

On the 1st day of May, 1905, plaintiffs filed their declaration in the words and figures following, to-wit:

"In the Circuit Court in and for Lee County, Florida.

Ejectment.

J. W. GRAHAM & B. F. HAMPTON

vs.

CHARLES H. GILL.

J. M. Graham and B. F. Hampton sue Chas. H. Gill in an action of ejectment.

Because the defendant is in possession of a certain tract or parcel of land lying and being in the county of Lee, State of Florida, known and described as follows, to-wit: Lot one of section 8, township 44 south, of range 21 east, containing about eighty-four 43/100 acres, to which said plaintiffs claim title; and the defendant has received the profits of said land since the 23rd day of Oct., 1900 of the yearly value of \$100.00 and refused to deliver possession of the said land to the plaintiff- or to pay them the profits thereof.

H. S. HAMPTON,

Attorney for Plaintiffs.

2 On the 14th day of November, 1906, defendant filed his plea in words and figures following, to-wit:

In Circuit Court, 6th Judicial Circuit of Florida, in and for Lee County.

Ejectment.

GRAHAM & HAMPTON

vs.

CHAS. H. GILL.

The defendant Chas. H. Gill for a plea to the declaration filed herein says:

1st. That he is not guilty.

2nd. And for a second plea this defendant says that he is not in possession of the land described in plaintiffs' declaration, and was not in possession at the time of the institution of this suit.

S. F. J. TRABUE,
L. A. HENDRY, AND
JNO. W. BURTON,

Att'ys for Deft.

STATE OF FLORIDA,

County of Lee:

Personally before me, Louis A. Hendry, a Notary Public, this day came Chas. H. Gill, the defendant herein, and says that the foregoing pleas are true.

CHAS. H. GILL.

Sworn to and subscribed to before me this 13th day of Nov. A. D., 1906.

LOUIS A. HENDRY,

Notary Public.

[NOTARIAL SEAL.]

On the 30th day of December, 1905, the plaintiffs joined issue on pleas of defendant.

On the 26th day of February, A. D., 1908, at a term of said Court came the said parties by their attorneys and submitted said cause on the issues joined between them to a jury, who being duly sworn according to law, and who having heard the evidence the charge of the court and argument of counsel returned the following verdict:

3

In the Circuit Court, Lee County, Florida.

Ejectment.

J. M. GRAHAM and B. F. HAMPTON

vs.

CHAS. H. GILL.

We, the jury, find a verdict for the defendant, Chas. H. Gill, so say we all.

W. L. HOPSON, *Foreman.*

On the 7th day of March, 1908, the plaintiff filed a motion in arrest of judgment, in the words and figures following:

In the Circuit Court for Lee County, Florida.

J. M. GRAHAM and B. F. HAMPTON

vs.

C. H. GILL.

Now comes the plaintiffs in the foregoing cause and within the time allowed by the Court, move the court to arrest the judgment in the said cause upon the following grounds, to-wit:

1st. Because the said verdict is contrary to the evidence and the pleadings in the said cause.

2nd. Because the said verdict is not in the form required by law.

3rd. Because there is a variance between the verdict in said cause and the pleadings.

H. S. HAMPTON &

F. C. ALDERMAN,

Attorney- for Plaintiffs.

4 On the 10th day of March, 1908, after due notice upon counsel for the defendant and service of a copy of said motion in the said cause, the said motion was presented to the court and the court made the following ruling thereon:

"Motion in arrest of judgment denied. Ruling excepted to. March 10, 1908.

J. B. WALL, *Judge.*

On the 11th day of March, 1908, the foregoing judgment upon the verdict of the jury was entered by the court.

It is thereupon ordered and adjudged by the court that the plaintiffs J. M. Graham and B. F. Hampton take nothing by their suit, and that the defendant Charles H. Gill go hence without day.

And it is further ordered and adjudged by the court that the defendant Charles H. Gill do have and recover of and from the said plaintiffs J. M. Graham and B. F. Hampton his costs and charges by him in and about his defense in his behalf expended to be taxes by the clerk, and that execution issue therefor.

On the 7th day of April, A. D., 1908, after the adjournment of said term by virtue of a special order to that effect, the plaintiff made up and tendered their bill of exceptions, which, after due notice, was settled and signed by the Judge, which said bill of exceptions is in the words and figures following, to-wit:

In the Circuit Court for Lee County, Florida.

5 I, Jos. B. Wall, Judge of the Circuit Court of the Sixth Judicial Circuit of the State of Florida, do hereby certify that during the progress of the cause pending in said court wherein J. M. Graham and B. F. Hampton were plaintiffs and Chas. H.

Gill was defendant, the following proceedings were had on the 26th day of February, A. D., 1908, during the term of said court the issues joined between the said parties came on to be tried before a jury and thereupon the plaintiff- produced and offered in evidence the following paper, to-wit:

The certificate from the Commissioner of Agriculture of the State of Florida, dated November 6th, 1905, certifying that lot 1 of section 8, Township 44 South, of Range 21 East was approved by the United States to the State of Florida as school indemnity land, April 20th, 1899, which was admitted and filed in evidence and marked exhibit number "1" (See page 7).

Counsel for the defendant objects to exhibit #1 on the following grounds:

First. Objection is made to the following words, and motion is made to strike the same, "and the said land was conveyed by the Board of Education of the State of Florida to B. F. Hampton and James M. Graham by deed number 3127, bearing date of October 23rd, 1900." The same does not show any title or ownership in the State or in the School, Seminary or Internal Improvement Fund.

Counsel for plaintiff- here states to the Court that the certificate is introduced only in so far as it refers to the acquisition of the title by the State from the United States or from the State of Florida.

The Counsel for defendant objects to the introduction of the certificate Exhibit #1 on the following grounds, to-wit:

First. Said certificate does not state any facts showing any ownership by the said State or by the School, Seminary, or Internal Improvement Fund, of the lands therein described.

Second. The certificate shows upon its face that the land therein described have never been granted or patented by the United States to the State of Florida.

Third. There is no authority for the "approving" of Section eight (8) or any part thereof by the Government, or any of its officers to the State of Florida as school indemnity land.

Fourth. The land included in said certificate was not granted or patented by the United States to the State of Florida for school purposes by the Act of Congress in said certificate mentioned.

Fifth. Said certificate does not show that the lands therein purported to have been approved were approved by any authorized authority or agent of the United States Government.

Objection overruled and exceptions noted.

6 And thereupon the plaintiff- offered in evidence a deed number 3127 dated October 23rd, 1900, from the State of Florida to B. F. Hampton and J. M. Graham, and being the land in controversy the said deed being filed and recorded in the office of the clerk of the circuit court of Lee county, Florida, October 29th, 1900, in the book number 9, page 462, which was filed in evidence and marked exhibit number "2" (See page 8).

To the introduction of Exhibit #2 the defendant objects on the following grounds:

First. Because no title has been shown to exist in the State of Florida to the lands described in said deed.

Second. Because the State of Florida has not acquired title to the lands described in the deed.

Third. The United States Government has not granted or patented said lands to the State of Florida for educational or other purposes.

Fourth. Because said deed appears on its face to be executed by the members of the State Board of Education who had no authority or power to execute the same.

Fifth. Because the State Board of Education is without power to deed the lands described in said deed."

Objection overruled and defendant excepts.

And thereupon the plaintiff offered in evidence a plat showing lot 1 Sec. 8, Tp. 44 S. of Range 21 East, the land in controversy certified under the hand of the Register United States Land Office, Gainesville, Florida, which is admitted in evidence as "Exhibit #3." (See attached to page 8).

And thereupon the plaintiff offered in evidence a certified copy of a plat of a plat of Township 44 South of Range 21 East, showing the land in controversy, designated thereon as Palmetto Key, the said plat being certified under the hand and seal of the Commissioner of the United States General —

PL'FF'S EX. No. 1.

I, B. E. McLin, Commissioner of Agriculture of the State of Florida, hereby certify that as such officer I am the lawful custodian of all papers and records relating to the lands of said State, and that lot one of section eight in township forty-four of Range twenty-one east, lying in Lee county, Florida, is embraced in list No. 20, approved by the United States to the state of Florida April 20th, 1899, as School Indemnity Land, under Act of Congress of March 3rd, 1845, and that said land was conveyed by the Board of Education of the State of Florida to B. F. Hampton and James M. Graham by deed No. 3127 bearing date of Oct. 23rd, 1900, as shown by the record of same on file in this office, and in my custody as aforesaid.

In Testimony Whereof I have hereunto set my hand officially and have caused the seal of the Department of Agriculture of the State of Florida to be hereunto affixed at the Capitol in the city of Tallahassee, on this the 6th day of November, A. D., 1905.

[SEAL.]

B. E. McLIN.

*Commissioner of Agriculture of
the State of Florida.*

Filed in open court this 25th day of Feb'y, 1908.

W. M. HENDRY, Clerk.

PL'FF'S Ex. #2.

v

Deed No. 3,127.

Know all men by these presents:

That the Board of Education of the State of Florida, under the provisions of Sections 234 and 235 of the Revised Statutes of the State of Florida, for and in consideration of the sum of one and 25/100 dollars per acre, to them in hand paid by B. F. Hampton and James M. Graham of the county of Alachua, State of Florida, have granted, bargained and sold, and do by these presents grant, bargain, sell and convey unto the said B. F. Hampton and James M. Graham, and their heirs and assigns forever, the following described lands, to-wit:

8 The lot numbered one of section eight in township forty-four south of range twenty-one east, containing eighty-four and 43/100 acres, and lying and being in the county of Lee in said state of Florida.

To have and to hold the said lands unto the said B. F. Hampton and James M. Graham and their heirs and assigns forever.

In testimony whereof, the members of said Board have hereunto subscribed their names and affixed their seals, and have caused the seal of "The Department of Agriculture of the State of Florida" to be hereunto affixed at the Capitol in the city of Tallahassee on this the twenty-third day of October, A. D., nineteen hundred.

W. D. BLOXHAM, [L. s.]
Governor.

JNO. L. CRAWFORD, [L. s.]
Secretary of State.

[SEAL.]

W. B. LAMAR, [L. s.]
Attorney General.

J. B. WHITFIELD, [L. s.]
Treasurer.

WM. N. SHEETS, [L. s.]
Superintendent of Public Instruction.

(Endorsed on back:) Filed in the office of the clerk of the Ct. Ct. Lee county, Fla. on this 29th day of Oct. A. D., 1900, and recorded in book 9 of — on page 462. W. M. Hendry, Clerk Ct. Ct.

(Endorsed:) Filed in open court this 25th day of Feb'y, 1908. W. M. Hendry, Clerk.

(Here follow maps marked pp. 8a, 8b and 8c.)

MAPS

TOO

LARGE

FOR

FILMING



PLIFFS' EXHIBIT 5.

Transcript of Field Notes of Certain Surveys in Township 44 South, Range 21 East, Florida, Executed by Deputy H. Jenkins in 1875 at a Variation of 4° 20' E.

9 These notes show lines connecting "Palmetto Key" in section 8 with mainland in section 1; also connection of small island in sections 17 and 20 with south end of "Cayo Costa" in section 32. Unnecessary lines are omitted.

Full lines on plat show lines of survey as given; dotted lines to show contour of islands, etc.

Begin at meander corner of sections 1 and 12, 7 chains west of range line, same being point of triangulation to Island No. 1.

From this point the flag on Island No. 1 bears S. 67° 50' W. I run a base line N. 44° 30' W. 15.00 to a point from which the flag bears S. 59° 30' W., giving a distance of 100.43, placing the flag in section 11, with a southing of 37.89 and westing of 20.00.

From flag on island No. 1, I run on west side of island No. 1 in section 11.

S. 73° 45' W. 0.50.

S. 40° 30' W. 13.00.

S. 13° 45' W. 4.50.

N. 76° 15' E. 2.50.

S. 38° 45' E. 6.50.

S. 4° E. 6.00.

S. 14° 30' W. 4.50. Point of triangulation of island No. 2.

From above point of triangulation on island No. 1 the flag on island No. 2 bears N. 78° 15' W. Run a base line S. 19° 45' W. 8.00 to a point from which the flag on island No. 2 bears N. 45° 15' W. giving a distance of 13.31. Sectional northing 37.23.

From flag on island No. 2 I survey- island in section 11:

S. 50° W. 1.50.

S. 11° E. 1.50.

S. 57° 30' E. 4.50.

S. 50° 15' W. 4.50.

S. 25° W. 4.50.

S. 1° 15' E. 3.81. Set post for meander cor. of secs. 11 & 14
Lop & Hack Bushes

Thence in Sec. 14:

S. 1° 15' E. 0.70.

S. 16° 30' E. 2.00.

S. 3° 30' W. 3.50.

S. 21° 15' W. 3.00.

S. 78° W. 1.50.

S. 42° 15' W. 4.50. Point of triangulation of island No. 3.

From above point of triangulation on island No. 2 the flag on island No. 3 bears N. 47° 30' W. Run a base line N. 4 W. to a point

from which the flag on island No. 3 bears N. $70^{\circ} 20'$ W. giving a distance of 35.44 locating flag in section 11 with a northing of 11.39 and westing of 71.02. Thence on island No. 3 in section 11.

10 S. $24^{\circ} 30'$ W. 1.50.

S. $5^{\circ} 30'$ W. 2.00.

S. $28^{\circ} 30'$ W. 4.00.

S. $56^{\circ} 15'$ W. 4.00.

S. 12° E. 2.35. Set post for meander corner of secs. 11 14 hack bushes. Thence west 2.00, set post for meander corner of secs. 11, 14. Hack bushes. Thence in section 11

N. $44^{\circ} 15'$ W. 2.00. Set post for meander corner of secs. 11, 10. Thence in section 10—

N. $44^{\circ} 15'$ W. 4.00.

N. 20° W. 4.00.

N. $56^{\circ} 30'$ W. 6.00.

N. 10° W. 4.00.

N. $54^{\circ} 15'$ W. 1.70.

N. $34^{\circ} 30'$ W. 2.25.

N. 80° W. 2.50.

N. $41^{\circ} 30'$ W. 4.00.

N. $44^{\circ} 30'$ E. 5.00.

S. $81^{\circ} 30'$ E. 3.00.

S. 60° E. 5.00.

N. $57^{\circ} 15'$ E. 8.00. To meander corner of secs. 10, 11. Thence in section 11

N. 56° E. 10.00.

N. $24^{\circ} 45'$ W. 15.00.

N. 54° E. 1.50. Point of crossing to detached key. Thence 11

N. $35^{\circ} 45'$ W. 2.50. Across water to flag on detached key; Thence in section 10

N. 17° W. 20.00.

N. 17° E. 3.50.

N. 8° W. 6.00.

N. 10° E. 3.07. Set post for meander corner secs. 10 & 3 hack mangroves. Thence in section 3

N. 10° E. 1.93.

N. 39° E. 2.50.

S. 62° W. 0.50.

S. 73° W. 1.50.

S. $62^{\circ} 30'$ W. 5.50.

S. 60° W. 1.25. To meander corner of secs. 10, 3. Thence in section 10

S. 60° W. 3.00.

S. $48^{\circ} 15'$ W. 3.50.

S. $17^{\circ} 30'$ W. 4.50.

S. $1^{\circ} 30'$ E. 4.00. Point of triangulation to Joseffa.

From point of triangulation on detached part of island No. 3 the flag on Joseffa bears N. $66^{\circ} 30'$ W. Run a base line S. 15° W. 8.50

to a point from which the flag on Joseffa bears N. $60^{\circ} 37'$ W. giving a distance of 80.32, a northing of 32.03 and westing of 73.65 placing flag in section 4 with northing of 19.91 and westing of 8.97.

Survey of Joseffa island. — Begin at flag. Thence in Section 4

S. $71^{\circ} 45'$ W. 2.70.

S. $5^{\circ} 30'$ E. 5.00.

S. $8^{\circ} 45'$ W. 6.50.

S. $26^{\circ} 30'$ W. 8.50. Set post for meander corner of secs. 4, 9.
Thence in section 9

S. $26^{\circ} 30'$ W. 2.00.

S. $54^{\circ} 30'$ W. 8.00.

S. 73° W. 3.00.

S. 12° W. 5.50.

S. 24° W. 3.50.

S. 35° E. 25.00.

S. 61° W. 9.50. Point of triangulation to Palmetto Key.

11 Begin on Joseffa at point of triangulation to Palmetto Key, the flag bears S. $78^{\circ} 30'$ W. Run a base S. $24^{\circ} 30'$ E. 8.55 to a point from which the flag bears S. $83^{\circ} 30'$ W. giving a dist. of 65.93, locating flag in section 8 with southing of 44.11 and easting (?) of 7.22.

Survey of Palmetto Key, then in section 8.—The flag has a sectional position of 44.11 south and 7.22 west.

N. 6° W. 2.00.

S. 79° W. 5.00.

N. 25° W. 7.00.

S. $86^{\circ} 30'$ E. 13.00.

N. 6° E. 3.00.

N. $58^{\circ} 30'$ W. 3.50.

N. 70° W. 7.50.

N. $32^{\circ} 30'$ W. 5.00.

S. 67° W. 11.00.

N. $77^{\circ} 45'$ W. 9.00.

N. 31° W. 13.00.

N. $70^{\circ} 30'$ W. 5.00.

S. $64^{\circ} 30'$ W. 5.50.

S. 14° E. 5.00.

S. $39^{\circ} 30'$ E. 2.00.

S. 8° E. 13.00.

S. $43^{\circ} 30'$ E. 17.00.

East 14.00.

N. $65^{\circ} 15'$ E. 13.50. To flag and place of beginning.

Begin at flag on south end of Cayo Costa. Thence with sec. north-
ing—40.30 & westing—26.05. Thence in section 32

S. $49^{\circ} 30'$ W. 3.50.

N. $84^{\circ} 30'$ W. 7.00.

N. 39° W. 9.00.

N. $20^{\circ} 30'$ W. 19.00.

N. $19^{\circ} 45'$ W. 17.52. Set post for meander corner of secs. 32, 29 (west side).

Thence in section 29

N. $19^{\circ} 45'$ W. 29.50.

N. $22^{\circ} 45'$ W. 25.00.

N. 27° W. 14.20. Set post for meander corner of secs. 29, 30.
Cabbage 10 in. dia. bears N. 74° E. 45 lks.

Thence North

16.55. Set post for corner of secs. 29, 30, 19, 20.

A mangrove 6 in. dia. bears N. 32° W. 23 lks.

" " " " " S. 40° E. 38 lks.

Thence North

10.20. Set post for meander corner of secs. 19, 20, lop & hack bushes.

Begin at meander corner of secs. 29, 30. Thence in sec.
30 N. 27° W. 18.50. To meander corner of secs. 19, 30.

Thence in section 19

N. 27° W. 2.00.

N. $31^{\circ} 45'$ W. 7.00.

N. $34^{\circ} 15'$ W. 23.00.

N. 42° W. 29.00.

N. $45^{\circ} 30'$ W. 41.00.

N. 51° W. 4.00. Set post for meander corner of secs. 18, 19.

Mangrove 9 in. dia. bears N. 30° E. 23 lks.

Cabbage 10 " " " S. 83° E. 64 "

Thence in section 18

12 N. 51° W. 2.68. Set post on range line for meander corner of secs. 18, 13.

Cabbage 10 in. dia. bears N. 11° E. 68 lks.

" " " " " N. 73° E. 104.

Thence North

38.30. Set post for $\frac{1}{4}$ sec. cor.

Dogwood 6 in. dia. bears N. 79° E. 19 lks.

Mangrove 4 " " " West 25 "

78.31. Set post for corner of secs. 7, 18, 12, 13.

Gum 12 in. dia. bears N. 76° W. 37 lks.

Cabbage 10 in. " " S. 43° E. 130 "

Thence East

40.00. Set post for $\frac{1}{4}$ sec. cor.

Gum 8 in. dia. bears N. 14° W. 35 lks.

Mangrove 5 " " " S. 39° E. 27 "

70.25. Set post for meander corner secs. 7, 18, no bearings.

Thence in section 18

S. 29° E. 2.00.

S. $33^{\circ} 30'$ E. 1.00.

S. 50° E. 6.50.

S. $29^{\circ} 30'$ E. 5.50.

S. $1^{\circ} 30'$ W. 10.00.

S. 18° W. 10.00.

S. 1° E. 1.50.

S. 18° E. 4.50.
 S. 10° W. 10.00.
 S. 13° W. 12.00.
 S. 34° 30' W. 14.00.
 S. 5° 30' W. 3.00.
 S. 63° W. 5.50.
 S. 42° 15' W. 5.50.

S. 60° E. 2.50.
 S. 9° 45' E. 1.75. To meander corner of secs. 18, 19.
 Thence in Section 19

S. 9° 45' E. 1.18.

East 2.00.

N. 20° E. 1.24. Set post for meander corner of secs. 18, 19 lop
 & hack bushes.

Thence in section 18

N. 45° E. 3.65.

N. 65° E. 4.00.

N. 75° E. 2.00.

N. 40° E. 2.00.

N. 37° E. 5.00.

S. 37° E. 1.00.

S. 24° W. 5.50.

S. 25° W. 5.00.

To meander corner of secs. 18, 19 and point of
 triangulation to small island.

Begin at meander corner of secs. 18, 19, the point of triangulation
 to small island. The flag on island bears N. 58° 15' run a base line
 S. 6° 30' W. 10.00 to a point from which the flag bears N. 46° 15' E.
 giving a distance of 30.75 placing the flag in section 17 with north-
 ing of 16.18 & Easting of 11.80.

13 Survey of island.—Begin at flag, thence in sec. 17

S. 41° E. 18.00.

S. 55° E. 4.55. Set post for meander corner of secs. 17, 20.
 Mangrove 5 in. dia. bears N. 10° W. 18 lks.

Thence in Sec. 20

S. 55° E. 15.45.

S. 64° E. 4.50.

S. 81° 30' E. 2.50.

N. 65° E. 2.50.

N. 34° E. 5.50.

N. 13° 30' W. 2.00.

N. 75° W. 5.00.

N. 32° W. 2.75.

To meander corner of secs. 17, 20.

Thence in Section 17

N. 32° W. 4.25.

N. 63° E. 3.00.

N. 74° E. 3.50.

S. 46° E. 4.00.

N. 86° E. 1.50.

N. 64° E. 5.00.

N. 31° E. 1.50.

N. 5° W. 1.00.
 N. 64° W. 1.50.
 N. 83° W. 1.50.
 N. 70° W. 5.00.
 N. 21° W. 4.50.
 N. 12° W. 1.50.
 N. 65° W. 3.00.
 N. 36° W. 4.00.
 S. 75° W. 7.50.
 West 7 50.
 N. 26° E. 7.00.
 N. 35° W. 3.50.
 N. 12° E. 2.50.
 N. 56° W. 3.00.
 S. 56° W. 3.00.
 S. 12° W. 2.50.
 S. 35° W. 3.50.
 N. 82° W. 4.50.
 S. 78° W. 2.50.
 S. 52° 30' W. 5.00.
 S. 5° W. 5.00. To flag and place of beginning.

OFFICE OF U. S. SURVEYOR GENERAL.
 TALLAHASSEE, FLORIDA.

I, Edmund C. Weeks, U. S. Surveyor General for the District of Florida, do hereby certify that the foregoing annexed pages numbered from 1 to 6 contain a true and correct copy of the field notes of the surveys of which they purport to be a transcript, as the same appears of record in this office. And I further certify
 14 that the solid black lines on the accompanying and attached plat show the connection between the mainland in section 1, with "Palmetto Key" in section 8 and also between the south end of "Cayo Costa" and the small island in sections 17 and 20, as shown by original field notes of survey, of record in this office.

Witness my hand and private seal, (there being no official seal) this 29th day of January, 1908.

EDMUND C. WEEKS. [SEAL.]
U. S. Surveyor General, District of Florida.

(Endorsed:) Filed in open court this 25th day of Feb'y, 1908.
 W. M. Hendry, Clerk.

15 —Land Office, Washington, D. C., which was admitted and filed in evidence and marked "Exhibit #4." (See attached to Ex. #3.)

And thereupon the plaintiff offered in evidence a certified copy of the field notes of the original survey made by the United States Government, of township 44 south of range 21 east, certified under the hand and seal of the United States General Surveyor of Florida, which was admitted and filed in evidence and marked "Exhibit number 5". (See pages 9 to 14 inclusive).

And thereupon the plaintiffs to further maintain the issues on their part produced and caused to be sworn as a witness JOHNNY JACK, who testified as follows:

I know Chas. H. Gill. I have within the last week gone to an island to show a person where Charles H. Gill had a place. Mr. Gill has his place on what is known to me as Palmetto Key. No, I cannot say that I know anything about the value of lands in general in Lee county. I have lived in this county a little over a year just at present. I have lived here years ago, but have been off six years. I know nothing about the value of orange crops. Well as near as I can judge Mr. Gill had about five or six acres of bearing fruit trees on his place at Palmetto Key. He had a small house there. I should say the house is worth about \$75.00. I cannot say just how long Mr. Gill has had these improvements there, but I suppose it has been about 12 years, more or less. I cannot say positively whether Mr. Gill lived there in the month of March 1905. I know Mr. Gill has been going up and down the bay there for a long while, but it has not been more than six or seven years I do not suppose that I found where his grove was.

16 Cross-examination:

Yes, sir; I went on the island known as Palmetto Key.

No, sir; I am not acquainted with land down in that section.

Well I would not swear whether it is in Lee county or not as I do not know where the Lee county line is. I went to that island yesterday about noon. Mr. Taylor asked me if I could not take him to the island and I told him I could. Mr. Taylor told me he was from Gainesville. I think he is a witness of the plaintiff.

Q. Did you notice the position of that island in connection with other locations around that territory.

Counsel for plaintiff- objects to the question because irrelevant and immaterial.

Objection sustained.

I approached this island known as Palmetto Key from Point Blanco. I went south from Point Blanco to the island known as Palmetto Key. After leaving Point Blanco, going south, I went about two or probably $2\frac{1}{2}$ miles before I came to this island. I went by water. Yes, sir, there was two islands between Palmetto Key and Point Blanco. They were small islands. No, I did not see any one living on these two islands, all subject to overflow. Yes, sir, I noticed land out west from Palmetto Key after I arrived there. Lacosta Island, about half or three quarters of a mile. Yes, sir, it is known as Cayacosta. No, sir, I did not meet Mr. Gill on Palmetto Key, he was not there. I do not know how long he has been living on that island. I walked all through the grove. No, I should not call it an old grove. I should take it to be probably about 8 or 9 years old. No, sir, I have no idea about how many trees there were. The trees were not planted in regularity. In some places they were much thicker than other-. The grove had the appearance of being neglected. The leaves had dropped, and also considerable fruit had dropped. Yes, sir,

17

I have met Mr. Gill there. Well, I cannot tell you how many times but I have met him there quite a number of times. There is no other island in that part of the bay of Charlotte Harbor known as Palmetto Key except this one. It is the only one I have ever heard of. I have been cruising about that county about 22 years.

Recross-examination:

Q. Do you know whether or not there is an island northeast from Point Blanco called Palmetto Key.

Counsel for plaintiffs objects to the foregoing question because irrelevant and immaterial.

Objection overruled and exception noted.

A. No. I know that Mr. Gill has lived there for quite a number of years. I would not say quite as long as 15, but I know for the past 12 years he had a place down the bay somewhere, but it is just within the past six or seven years that I have been acquainted with the place. I know for the past 6 or 7 years Mr. Gill has been living on an island south of Point Blanco known as Palmetto Key. I have been from Point Blanco east to the mainland I suppose about 15 miles.

J. M. CRUMPTON, a witness for plaintiff, being duly sworn deposes and says: My name is J. M. Crumpton. I am a civil engineer. I am classed as engineer in the Government surveys. My headquarters are in Tampa. That is the headquarters of the United States Engineering department for that portion of Florida. This district covers Charlotte Harbor. I have had that position about nine years or a little more. Why we make local surveys, 18 but geodetic surveys we do not have anything to do with, but all local surveys are made by us.

Yes, sir, I have been employed as a surveyor to determine where Charles H. Gill the defendant in this case has his residence and improvements. In determining the location of his position I used the Government plat and field notes of the original township made by the United States as a reference in connection with my work.

Witness is here handed exhibit number "5" and asked to state if these are a copy of field notes he employed. Witness says they are the same. I found the field notes as made by the surveyor mentioned in there at the time of his survey to be correct as to the location of the land.

Q. Please examine this plat. (Witness is handed exhibit number 4.) Tell us where you located Gill's house and improvements?

Counsel for defendant objects to the foregoing question on the ground the question is not where he located Gill's house and improvements, but where lot 1 of section 8 is and the title claimed by the plaintiffs in this case.

Objection overruled. Defendant excepts.

A. According to my notes this is in a correct position in reference to Useppa Island. This (meaning Ex. #4) is according to my idea

an exact location of the island which is located in section 8 of township 44 range 21, west of the southern end of Useppa Island. I did not re-survey this portion of that township in order to get at this. I surveyed from the corner of sections 7 and 8, 7 & 18 township 44 south of range 22 east, beginning at that corner marked by the Government. I commenced at this point because after going over the grounds and making inquiry I found that this was the most available mark established in that nearby section and for other

reasons it was through a territory which was more convenient and better adapted for taking measurements, and as

I stated in the first place there was a monument erected by the Government Survey. Yes, I crossed his line of survey. No, I did not follow the field notes when making the survey westerly.

Q. Tell us how you know these field notes are correct?

Objected to by counsel for defendant because witness has testified that he did not follow the field notes but made a separate survey, and the separate survey would tend to change and alter the plat made by the Government.

Objection sustained.

I merely made that survey to be sure of being correct. I surveyed from the monument. I did check over these field notes and state that Palmetto Key is in section 8 township 44 south of range 21.

Cross-examination.

No, sir, I did not say that I made my survey in accordance and with reference to the field notes of the plat. I stated that I used them as a reference and finding the location. No, sir I did not use these field notes in my survey. I did not use them or follow them in any way.

Q. These marks, Government marks that you say you found. What kind of marks or monuments were they?

A. The corner stake was faced on 4 sides and had the appearance of the sections respectively, according to the way they will appear on each face according to the direction they would be 7 and 8, 18 and 17. This stake was the only corner marking there that I found. I was told by several different ones that this stake was there. No, sir, I do not know whether this stake was placed there by the Government in this original survey. I could not answer to that. It had the appearance of standing there for a number of years. In approaching Useppa

Island I triangulated from the island Point Blanco to the island East of Useppa and then I triangulated to the Useppa

Island. It certainly is the rule and custom for the Government in surveying land and making field notes to note in these field notes the location of such a stake as I have just mentioned. The stake that I made my survey from is not mentioned in these field notes. Well, I have been surveying for about ten years. No, sir; the United States Engineering Department did not employ me to make this survey. Milton S. Hampton employed me to make this survey. I believe he is the attorney for the plaintiff so far as I know. I think I should class my survey as an official survey. I

would not class it as a Government survey. No, sir; I did not locate any other points or positions when I made this survey, except to take in all outlines of this island and place it sectionally. When I found this stake I surveyed to Palmetto Key from this point. It was not land all the way. The way I surveyed this land I run post the distance from this point until I got to the point where I had to cross, and then I triangulated from one island to the other. Yes, sir, I triangulated and started from this point and got to the island. I never looked for any other land south or southwest from there. I do not know Point Blanco from Fort Meyers. I did not go to any other island except Useppa Island and the island east of it. I did not examine any land west of Palmetto Key. About the only surveying I did was from this stake down to the west edge and then triangulated across to an island called Palmetto Key. I did not find any stakes on Useppa Island; did not look for any. I did not locate Useppa sectionally. I can do it from my notes, but I did not establish any sectional corners. Mr. Platt and Mr. Stafford were my helpers on this survey. I used a boat in crossing the water. In leaving Palmetto Key I went east. I never estimated the acreage of Palmetto Key. I made a tour survey. I never took the compass, but as near as I can remember I went east from there; 21 then I went back to where I was stopping. I was at Pine-land Post Office; it is on the island over here, but it is not shown. Why I saw patches of land north and west of me when I was on Palmetto Key but I did not pay any attention specially to it. I cannot say positive whether there are any other islands in Charlotte Harbor south of that point.

Yes, I noticed land north of this island when I surveyed it. I do not know what land it was. I cannot tell how far away the land was. As well as I can remember it looked like an island. I do not remember the shape of it. Why I have heard quite a number of people express their opinion concerning this island, Palmetto Key. No, sir if I remember right I heard nothing about Point Blanco.

Q. You made no other survey from the west or other point except from Useppa Island?

A. Except across from Palmetto Key. This is the only survey made by me. No, sir; I have never been in that location before, except one time I think I was on a steamer at the mouth of the pass, laid up there by a storm. I never made any surveys in that locality before. I never followed any field notes made by the Government in making this survey. Why, there was no one at Mr. Gill's place at the time we were there; I was told Mr. Gill was in Punta Gorda. I did not know where Mr. Gill lived prior to the time I went there. I say this survey was started from the Government land point. Yes, sir; I say I did not know whether this stake was placed there by the Government survey or not.

Q. That you never located that stake by any of the field notes made by the Government, and that you found this stake without following any field notes and that you surveyed from it without following any field notes, and that you located this island called Pal-

metto Key on your own individual survey separate and apart from the field notes; is that right?

22 Redirect examination.

I was not given any instructions by you as to where to start my survey. You told me you wanted me to go down there and find some established land-corner and make a survey of Palmetto Key, known by everybody as Palmetto Key, and locate it sectionally as described. When I got to Palmetto Key I did find a Government monument on there. Yes, sir; I am familiar with quite a number of monuments placed by the surveyors in making the original Government surveys in Florida. This monument on Palmetto Key was very similar in every respect to other ones I have seen established by the Government. There was a corner lot surveyed from that Government post. I cannot tell you the man's name who lived there. When I got to Palmetto Key I did refer to the Government field notes to see if the triangulation made at the time of the original survey was correct. I located it sectionally, but I never looked up or established any sectional point.

Q. Yes, sir. I have the field notes made at the time of my survey.

Counsel for defendant objects to the introduction of the field notes on the ground that the witness himself has testified that they were not made with reference to the original field notes of the Government plat and that he did not establish a point from any known Government position or line, but from one that he had located himself.

Objection overruled and exception noted.

Field notes admitted in evidence and marked "Exhibit No. 6." (See pages 23 to 25 inclusive.)

Q. Mr. Crompton tell the jury why you know your survey is correct, that is in what respect did you verify it with the Government survey.

Objected to by counsel for defendant.

Objections overruled and defendant excepts.

23 A. Because I am satisfied in my own mind that the corner that I started from was an established Government marked corner of these four sections, and I was told there by several different parties that had lived there some time. And anyway with my instructions and with proper care taken with the work I was perfectly satisfied that my work could not be in error. My survey fits in with the Government survey with township 44-21 in accordance with the contour and position of the island.

Recross-examination.

By Mr. HENDRY:

At the time I was on the island there was no one there that I know of. I do not know whether or not there is an island in section 17.

township 44 south of range 21 east as I did not see any island joining that.

PLAINTIFFS' EXHIBIT No. 6.

Field Notes.

Survey of Palmetto Key, in Township 44 S., R. 21 E., Florida, Made by J. M. Crumpton Jan., 1908. Magnetic Variation $1^{\circ} 38' E.$

Begin at corner sections 7, 8, 17, 18 T. 44 S. R. 22 East.
Bearings here given being true.

- I run N. $2^{\circ} 26'$ W. 658.0 feet.
 N. $0^{\circ} 13'$ E. 546.0 "
 N. $32^{\circ} 40'$ W. 582.0 "
 N. $56^{\circ} 14'$ W. 570.0 "
 N. $63^{\circ} 46'$ W. 604.0 "
 N. $88^{\circ} 59'$ W. 434.0 "
 S. $87^{\circ} 16'$ W. 426.0 "
 N. $47^{\circ} 08'$ W. 632.0 "
 N. $70^{\circ} 44''$ W. 386.0 "
 N. $87^{\circ} 33'$ W. 244.0 "
 N. $50^{\circ} 09'$ W. 156.0 "
 N. $26^{\circ} 37'$ W. 110.0 "
 N. $66^{\circ} 22'$ W. 244.0 "
 S. $35^{\circ} 13'$ W. 234.0 "
 S. $70^{\circ} 16'$ W. 124.0 "
 N. $32^{\circ} 02'$ W. 614.0 "
 N. $39^{\circ} 41'$ W. 502.0 "
 N. $54^{\circ} 59'$ W. 348.0 "
 I run N. $33^{\circ} 38'$ W. 604.0 "
 N. $57^{\circ} 17'$ W. 944.0 "
 N. $48^{\circ} 49'$ W. 680.0 "
 N. $55^{\circ} 50'$ W. 964.0 "
 24 N. $65^{\circ} 49'$ W. 492.0 feet.
 N. $69^{\circ} 16''$ W. 400.0 "
 N. $44^{\circ} 26'$ W. 266.0 " point of triangulation to flag number 1 from which flag number 1 bears S. $83^{\circ} 20'$ W. Run base line N. $24^{\circ} 34'$ W. 1200.0 feet. Point of triangulation to flag number 1 from which flag number 1 bears S. $75^{\circ} 01'$ W. giving a distance 7894.6 feet.
- From Flag No. 1
 I run S. $64^{\circ} 10'$ W. 800.0 feet.
 S. $42^{\circ} 07'$ W. 900.0 " point of triangulation to flag No. 2 from which flag No. 2 bears N. $80^{\circ} 41'$ W. Run base line S. $9^{\circ} 28'$ W. 1150.0 feet. Point of triangulation to flag No. 2 from which flag No. 2 bears N. $67^{\circ} 36'$ W. given a distance of 5080.2 feet.

From flag No. 2

I run S. $74^{\circ} 45'$ W. 354.0 feet.

N. $52^{\circ} 32'$ W. 84.0 " point of triangulation to flag No. 3 from which flag No. 3 bears S. $63^{\circ} 26'$ W. Run base line N. $2^{\circ} 32'$ W. 590.0 feet. Point of triangulation to flag No. 3 from which No. 3 bears S. $47^{\circ} 01'$ W. giving a distance of 1906.6 feet.

From flag No. 3

I run S. $16^{\circ} 42'$ W. 852.0 feet.

S. 14 12' E. 360.0 "

S. 31 31' E. 558.0 " Point of triangulation to flags 4, 5, 7, 8 on Palmetto Key from flag No. 4 bears S. $58^{\circ} 44'$ W.
5 " S. $72^{\circ} 15'$ W.
7 " S. $44^{\circ} 07'$ W.
8 " S. $33^{\circ} 13'$ W.

Run base line S. $17^{\circ} 40'$ E. 806.0 feet. Point of triangulation to Flags 4, 5, 7, 8 on Palmetto Key from which flag

No. 4 bears S. $79^{\circ} 14'$ W. distance 2237.0 ft.

5 " S. $89^{\circ} 58'$ W. " 2648.6 "

7 " S. $67^{\circ} 46'$ W. " 1770.5 "

8 " S. $46^{\circ} 41'$ W. " 2685.3 "

From flag No. 8

I run S. $31^{\circ} 46'$ W. 124.0 feet.

S. 60 18' W. 268.0 "

N. 64 44 W. 620.0 "

N. 56 08 W. 1200.0 "

N. 49 42 W. 926.0 "

N. 34 22 W. 370.0 "

N. 16 15 W. 328.0 "

N. 2 48 W. 124.0 "

N. 31 58 E. 342.0 "

S. 83 31 E. 350.0 "

25 From which flag No. 5 is visible completing contour of Palmetto Key.

(Endorsed:) Filed in open court this 25th day of Feb'y, 1908.
W. M. Hendry, Clerk.

No, sir, I do not think there is an island in section- 17, 21, 44.

Q. In your survey what makes you say that it agreed with the field notes?

A. Because in plotting my surveys it shows that it is located in the same spot that the Government chart does; that is the reason, sir. There was not witness-tree at this corner post that I started my survey from showing that it was correctly located. I did not find any other marks showing that this was correctly located.

Redirect examination:

There were no trees near this corner, it was clear land around there. On Palmetto Key I found a dock built out from the edge of the island and on the interior I found an orange and grape-fruit grove of several acres. Well I would say four or five acres, or something like that, and on this was a small house or room you might say. I suppose about 12 x 14 or 12 x 16 single-room building.

Q. Since coming to Fort Myers have you heard a description from Captain Jack who testified here as to what improvements were on that island called Palmetto Key.

A. Yes, sir.

Q. State whether or not his description of the improvements on Palmetto Key agree with what you found there.

Objected to as hear-say by counsel for Defendant.

Objection sustained.

26 A. W. TAYLOR, witness for Plaintiff-, being sworn deposes and says:

My name is A. W. Taylor. I came from Virginia and have lived in Florida about fourteen years. I have been a civil engineer for about forty-five years just after the Civil War, in 1873. On February the 2nd, 1902, at the request of Mr. Graham, I made a survey and examination of Township fourty-four, Range twenty-one to determine where Gill was located. I located him in section eight. I have forgotten the township and range, but I think it was township fourty-four and range twenty-one. After examining the Government field notes, and according to the same, I find him located in Township fourty-four, south, and range twenty-one east which I find constitutes only one island, and on the Government field notes is numbered (Lot) "1". I used the official field notes of the Government survey and found the same to be correct. From the north end of Juseffa I taken my bearing and came over to Patricio, and another island, I don't know the name of it. Patricio is an island that bears northeast from the island of Juseffa. From an island that is sixty-six degrees and thirty minutes south, and from the north point of Juseffa, and from the field notes I located this island Palmetto Key, to the south of Juseffa, according to the bearings in the field notes. The field notes show, and there is no question about it, but that the Government located this island Palmetto Key from the mainland. Day before yesterday I went out there with Captain Jack for the purpose of checking up these bearings again. I carefully checked my bearings. I didn't use the Government notes, but took my bearing to the north end of Juseffa island. According to the field notes the north end of Juseffa island is the Government starting point. I found the island in section eight, the same old place. Standing on the south end of Juseffa island Palmetto Key is almost due west, and there certain can be no mistake about that. I have not made any calculations, but suppose Juseffa island and Palmetto Key are about half a mile apart. Mundungo island is northwest from Juseffa. The south end of Juseffa island is in section nine, and according to the Government surveys the section due west would be in section eight. I

27

examined the country south of section eight in township forty-four and found there in section seventeen a coral reef, and by reason of the coral reef we could not get over there close to it. It is exposed at low tide, but at high tide the water often goes all over it. It, this territory in section seventeen, contains no vegetation, or mangrove trees or the like. There might have been an island there some thirty years ago, as the original survey was made about thirty years ago, 1875 was when it was made. I have surveyed a good deal on the coast around among these islands.

Q. Is it possible for an island to have been there in 1875, and by the action of the tides, and erosion, to have been washed away in 1905?

Objected to. Counsel for defendant objects to the question as asking an opinion of the witness.

Mr. HAMPTON: He says he is familiar with the coast.

The COURT: It depends upon whether the questions asks his expert knowledge of it. You can cross him upon it.

Q. Answer the question?

From my experience I guess it could be if it was simply a sand island; there has been cases of the kind. I am told that the pass going out from St. Andrews Bay was made some twenty years ago, that a big storm shaped the whole thing. There is a pass there now that will admit vessels drawing twenty feet where there was sand probably twenty years ago. This was the big storm that wrecked all the vessels in Pensacola Bay. During about eighteen years on account of the washing of the island the light-house has been twice moved. By examining the field notes I find that the Government Surveyor names therein "Palmetto Key". He there gives the survey of Palmetto Key, and locates it in section eight. In section seventeen and triangulation of section seventeen to the south end of Cayo Costa, which is sometimes called "La Costa Island," he runs up there to twenty-nine and then goes on up from twenty-nine to eighteen, and then goes on up there to the corner of sections eighteen and nineteen to the point of triangulation to a small island which is in section seventeen, and facing the flag with a bearing of sixteen and eighteen. It is my opinion that in 1875 there must have been an island there then, but there is none there now. At the present time there is only one island in sections eight and seventeen. If there was another island it certainly must have been it, for it is certainly not there now. The area of Palmetto Key is given at eighty-four and forty-two hundredths acres. The area of the island in section seventeen is ninety-eight and seventy-two hundredths plus thirteen and ninety-four hundredths. The contour of the island in section seventeen does not agree with that in section eight, and also contains one hundred and twelve or thirteen acres. Palmetto Key appears about like it is shown on the plat.

Cross-examination.

By Mr. HENDRY:

I surveyed all of this land in township forty-four and range twenty-one in the year 1902, but I did not at that time survey La Costa, but confined my survey then to Juseffa, Mundango and Patricio islands and Palmetto Key. In making my survey I started near the north end of section eight across Juseffa, where the north line of eight crosses Juseffa, or rather between the hotel and that house of Roache's. I found a Palmetto was marked on the east side and found some marks on some mangrove trees and then I measured down from the north end of Juseffa the distance that the notes gives here to that crossing where the section lines cross the island.

28 I went to the north end of Juseffa and took my bearings and from these three different islands that were located from the north end of Juseffa island. I then surveyed down Juseffa island but found no stakes of any kind, only two hacks on a palmetto tree, and one or two over on some mangroves over on the west side. This point that is shown on the field notes is in sections four and nine. He run south seventy-one degrees and forty-five minutes, west two chains, north seventy links, south five degrees and thirty minutes, from the north end of the island. That is the field notes he gives from locating that north end of Juseffa, and then he runs south eight degrees and forty-five minutes, west six chains and a half, and south twenty-eight degrees and thirty seconds west, eight chains and fifty links from a staff posted on the corner of section- four and nine, south line of four, and north line of nine. By following the field notes I was led to the marks where the section line crosses Juseffa, and from that point I ran across the island toward the west over to the other side, the island being only a few yards across at that point. On the other side to the water's edge I found only these hacks, just the same old thing, just two chips on the trees. I just followed this line from the east side to the west and found nothing but water and some marks on these mangroves trees over there, which trees were one hundred feet back from the water's edge. In going down to the south end of Juseffa I did not see any marks. I made this trip in a boat and went around to the other side. I do not know how far it is from where I took the boat to the south end, as I didn't survey down there at all. I found no marks of any survey at the south end of the island. When I reached the south end I set up there and took the bearings by the field notes to see whether it would strike this Palmetto Key. At that time I did not go across at that time, but I could see the land, but did not know it was Palmetto Key only from the description from the notes, and the bearing I struck that island.

I have never surveyed from Cayo Costa, and have never
29 tried to locate any land in section seventeen from any points.

I only noticed to the north a coral reef, but I did not go to it. I did not see any land in a northeasterly direction, but you can see across Boca Grand pass up there. I can't tell what point on Boca Grand pass it was I saw, as I did not go over there, it is too

far to tell from where the land is. I never paid any attention to Point Blanco at that time, feeling that I had located these lands according to the Government field notes, and I don't know whether Point Blanco was down there or below. I didn't do any surveying farther down than the south end of Juseffa island at that time and took the bearings that the field notes gave to see if they hit Palmetto Key. I saw some land up toward the northwest that I did not know what it was, and that was all the surveying I did. Day before yesterday I went in Captain Jack's yacht from Fort Myers, and landed first on Juseffa island, and then went around to this island of Mr. Gill's. From Juseffa we went to Point Blanco. The place Captain Jack said was Point Blanco is due north of Palmetto Key. When we left Point Blanco we went to Gill's house. We took bearings from the north end of Juseffa island and from Point Blanco. I looked out south of Point Blanco and saw two small islands. When I left Point Blanco I went down to Gill's place, to his haven, which is south about a quarter of a mile from the south end of Point Blanco, where I started from. This island on which Gill lives is known as Palmetto Key. According to the field notes this island is in section eight, township forty-four, range twenty-one. According to that plat there I don't know where in the devil it is; but if you will take these field notes and follow them from the mainland there and go straight you will put that island in section eight, sure.

Q. Is that island now that appears on that map as being south of Point Blanco which you have just now testified to, is that island in section seventeen, according to the plat that you hold?

30 A. Is the island in seventeen? It is just a mile, well it is a mile because there is one section, and also there is a section on the south side.

Objected to. Counsel for Plaintiff- objects to the question because it seeks to vary the Government plat.

The Court: He can cross him on the plat. You introduced the plat, and of course he can cross him as to what is shown on the plat.

To which ruling of the court plaintiff- by counsel then and there excepted.

A. Taking Point Blanco as correct on there, that island is south of Point Blanco, there is no question about that. Mr. Jim Graham first employed me to survey this island, he is no kin to John A. Graham of Manatee county that I know of. I did not survey the island west of Juseffa upon which Mr. Gill lives. I have never personally experienced any washouts, except that one at St. Andrews. I only know from hearsay that there was a sandbank there. I have been down here only twice and do not know the character of the rush of waters down there. There were no storms while I was there, and I could not tell if an island in Charlotte Harbor could be washed away. I have never read the story of the hotel on Sand Island where the boat washed on land and the hotel went to sea. This map or plat that I have was commenced in 1875, May the 26th, and was finished June the 2nd, 1875, which plat is marked

Exhibite Three, and according to it there is an island south of Point Blanco which has on it the name Charles H. Gill. I suppose that W. G. Robinson, Registering Receiver, wrote that on there.

Redirect examination.

By Mr. HAMPTON:

According to plat marked Exhibit "3" Gill's island is in section seventeen. The description of the land there is ninety-eight and seventy-two hundredths acres, or is lot two of section seventeen.

31 The contour of the island in seventeen is not the same as that of the island on which Gill has his name; it is not the same as Palmetto Key at all. It is not shown by the Government field notes that it is necessary to go to Point Blanco to locate Palmetto Key, but it is located from the mainland. It is impossible to locate an island without some well defined starting point, and the United States Government survey was made from the mainland over across Pine Island. I have no experience as to the value of Florida lands in this part of the country, though I am pretty familiar with the value of Florida lands all over the State.

Q. Well, please state what, in your opinion, would be the rental value of that land per year from——?

Objected to. Counsel for defendant objects to the question because the witness is not qualified to answer.

Objection sustained.

Recross-examination.

Mr. HENDRY:

Q. When you went to where Mr. Gill lives on this island, which you state is south of Point Blanco, did you go all around it?

Objected to. Counsel for complainants object to the question because the same is not rebuttal of cross-examination.

Objection is overruled. To which ruling of the Court complainants by counsel then and there excepted.

A. I did not go all around the island on which Gill lives, or do I know the contour of it, I simply went to where he had cleared and had a field.

Redirect examination.

Mr. HAMPTON:

You can see the northeast corner of lot one in section eight in approaching the island from Point Blanco, but you cannot see the contour of the whole island. I only saw the east side
32 of Palmetto Key, and it has little resemblance to the island in section seventeen.

And thereupon the plaintiffs to further maintain the issues in their behalf produced and caused to be sworn as a witness J. M. CRUMPTON, who testified as follows:

Direct examination.

By Mr. HAMPTON:

By examining the plat, Exhibit number four, I should say that the contour of the island in section eight is nothing like that in section seventeen. I have examined Palmetto Key to see the contour of it, and have drawn a line clear around it, and find that its area agrees with that given in the field notes. In surveying this island I did not run into the Government lines on Juseffa island, but my sectional line crossed in practically the same point on Juseffa island at it did, so I am informed. In accordance with the Government field notes Palmetto Key is due west of Juseffa island.

Cross-examination.

By Mr. HENDRY:

According to this map I see an island down below in section seventeen, but I never noticed it while I was there or went on it. I do not know whether the contour of the island in section seventeen would be like that in section eight; the only way I can tell is by examining here. I surveyed the island walking on land about ten or fifteen feet from the water's edge, and went entirely around the island from starting point to finish. I did not go on island in section seventeen, and know nothing of the contour of it.

33 Redirect examination.

By Mr. HAMPTON:

Because I believe it and my eyes do not deceive me. I do not believe that the contour of Palmetto Key is the same as that of the island in section seventeen.

And thereupon the plaintiffs produced and caused to be sworn as a witness, to further maintain the issues in their behalf, R. B. LEAK, who testified as follows:

Direct examination.

By Mr. HAMPTON:

I was sworn as a witness in this cause, but I do not remember having testified at the last trial as to the rental value of these lands. I am familiar with the lands in this section where Mr. Gill lives, and in my opinion, as the land is improved now, the rental value would be two hundred dollars a year.

Plaintiff rests.

And thereupon the defendant to further maintain the issues in his behalf offer in evidence a Patent from the United States Government, issued to Charles H. Gill, to lot No. 2 in section seventeen

in township forty-four south of range twenty-one east, date June 25th, 1901, which was filed in evidence without objection and marked Defendant's Exhibit 1. (See page 34.)

And thereupon the defendant to maintain the issues in his behalf was sworn as a witness and testified as follows:

Direct examination.

By Mr. HENDRY:

My name is Charles H. Gill; I am the defendant in this case that Mr. Graham has brought against me. I live in Punta Gorda, and also on an island in Charlotte Harbor. I have two homes. I have lived on that island for about twelve years, and have over
34 three hundred bearing fruit trees, and about eight hundred trees set out a year or two ago. Colonel Trabue put me on this island as a homestead, and I have resided there ever since, since 1894. I have a patent which was issued from the Government which was introduced here a while ago as an exhibit.

Q. Are you living on the land that that patent calls for?

A. Yes, sir.

(DEFENDANT'S EXHIBIT No. 1.)

The United States of America to all to whom these presents shall come, Greeting:

Homestead Certificate No. 15013; Application 25066.

Whereas, there has been deposited in the General Land Office of the United States a certificate of the register of the Land Office at Gainesville, Florida, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the Public Domain", and the acts supplemental thereto, the claim of Charles H. Gill has been established and duly consummated in conformity to law for the lot numbered two of section seventeen in township forty-four south, of range twenty-one east of Tallahassee meridian in Florida, containing ninety-eight acres and seventy-two hundredths of an acre, according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General. Now know ye, that there is, therefore, granted by the United States unto the said Charles H. Gill the tract of land above described. To have and to hold the said tract of land with the appurtenances thereof unto the said Charles H. Gill and to his heirs and assigns forever.

In testimony whereof, I, William McKinley, President of the United States of America, have caused these letters
35 to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the twenty-fifth day of June, in the year of our Lord one thousand nine hun-

dred and one, and of the Independence of the United States the one hundred and twenty-fifth.

By the President.

WILLIAM McKINLEY,
By F. M. McKEAN, *Secretary*.

C. W. BRUSH, [LAND OFFICE SEAL.]
Recorder of the General Land Office.

Recorded Florida Vol. 102, page 374.

(Endorsed:) Filed in the Office of the Clerk of the Circuit Court Lee county, Florida, on this 6th day of Feb. A. D., 1901, and recorded in book C of deeds on page 178.

[SEAL.]

W. M. HENDRY,
Clerk of Circuit Court,
By H. A. HENDRY, *D. C.*

Objected to. Counsel for complainants object to the question because it asks an opinion of the witness; second, because the Government surveys and plats are the best evidence.

Objection is overruled. To which ruling of the court complainants by counsel then and there except.

This piece of land that I am living on is the only piece of land I have down in Charlotte Harbor. I judge it is the same land the patent calls for, though I am not a surveyor. This land is very near a mile south from Point Blanco. This tract contains ninety-eight acres and a fraction. I know Mr. McAdow who lives almost west of me on La Costa. I know Mr. Ware who lives right around 36 the island on the other island, in a southerly direction. Gentlemen of the jury, on this plat, exhibit No. 4 here is where I live; here is Point Blanco, and I live south. Here is section seventeen. Lot two, section seventeen, township forty-four, range twenty-one east; that is east. Mr. McAdow lives on lot five of section eighteen. Right here is Caya Costa, which is an island, which is west from where I live. They live west from me, and I do not know if anyone else lives on the island or not. From where I live to where Mr. McAdow lives, from his landing it is a good half-mile, nearly three-quarters of a mile.

Q. Now, examine that plat, Mr. Gill, and state in what section Point Blanco is situated,—just point there?

Objected to. Counsel for Plaintiffs object to the question because the plat speaks for itself.

Objection sustained.

Objected to. Counsel for Plaintiffs object to counsel for defendants explaining this plat to the jury, and insist that they sit down and let the jury alone.

Objection sustained.

Mr. TRABUE:

Q. What year did you go there, Mr. Gill?

Objected to. Counsel for Complainants object to the question because it has already been answered by the defendant.

The COURT: Do you remember, Mr. Gill, what year you went there?

A. Well, if I have sworn to it, I can't tell you.

Cross-examination.

By Mr. HAMPTON:

I have helped to survey this land, though I am no surveyor and don't pretend to be, and I do not know whether the land as run out is correct or not. I was told by the man that put me on it that it had no name, but it has been called Palmetto Key. I am honest:

I would not tell you anything, and in the neighborhood it
37 has been called Palmetto Key. Mr. McAdow lives in section eighteen, lot five, about three-quarters of a mile in sort of a diagonal direction. The patent that I have calls for lots one and two in section seventeen, which is the land that the Government gave me. This island Joseffa from where I live is almost due east, and from Joseffa where I live would be nearly due west, a little diagonally. There is only one island of any consequence there, the one I live on, there are three little islands off to one side of it, to the northeast. I helped the De Soto county surveyor to survey it, and we found one hundred and thirteen acres. Ninety-eight and eighty-one hundredths acres are in one piece, and eleven or twelve acres in section twenty. I think the surveyor was Mr. Clark from De Soto county.

Q. What Clark? Who else was with you besides Clark, do you remember, on that survey?

Motion to strike.—Counsel for Complainants move the court to strike the preceeding question and answer because the witness has testified that he is not a surveyor, and because hear-say evidence would not be proper.

Objection is sustained. Question withdrawn by counsel for the defendant.

A. We found some cypress trees on the island which was our starting point.

Mr. TRABUE:

Q. Do you know whether it was by these field notes that the survey was made?

A. That is what we run by.

Q. These notes here?

The COURT: If he has examined the field notes, he knows if these are the same ones, but unless he was a surveyor he could not tell whether they were the Government field notes.

Objected to. Q. Counsel for complainants object to this method of examining the witness.

Objection is sustained.

A. I got these field notes from the office where they get field notes from.

38 And thereupon the defendant to further maintain the issues on his behalf produced and caused to be sworn as a witness R. B. LEAK, who testified as follows:

Direct examination.

By Mr. HENDRY:

My name is Robert B. Leak. I am surveyor of Lee county. In reference to a suit brought by Mr. Graham and Mr. Hampton to get possession of a certain island from Mr. Gill I will say that I have done some surveying down there. I know Mr. Gill, and have been to his home which is on what is known as the "Key." I have heard it called "Gill's Key," and "Palmetto Key." I have surveyed the key on which Mr. Gill lives. I surveyed from the Government field notes, and don't think I need them to testify from. I made two surveys down there, and didn't locate this according to the field notes given here, only part of them. The point at which I began is not shown here on exhibit number five: I began on the upper end of Capitiva Island.

Q. Only a part of that. Well, was the part that you used in locating that island the Government field notes, and can you locate the part in these field notes?

A. I will state to the jury, the point is not shown here in the field notes where I began, it is a point on the upper end of Capitiva Island.

Motion to strike.—Counsel for complainants move the court to strike the question and answer because it is shown that the survey was not made from the Government field notes, and is a private survey.

A. I will state that I had the Government field notes, of the point from which I started, and from that point of land to the point of triangulation according to the Government notes and from Capitiva Island and from Caya Costa Island, and the La Costa Hotel, that is what I had to work by, and I began at the south end of La Costa. I followed the Government field notes as
39 long as practical. I found from the field notes that the western boundary of the island could not be followed without going into the water, but by taking a meandering course west to the southern boundary of section seventeen, thence running east to the west of Charlotte Harbor, and to the south boundary of section eighteen is where I first came to it and ran east and located Gill's Key in section seventeen. At the point at which I started I found some Government marks, a post, as the Government marks them, at the upper end of Capitiva Island, and then I found two corners

on the south end of the island that were known as Government corners. In the triangulation across from Caya Costa Island to where I found Mr. Gill in section seventeen I found no Government marks or posts there. Starting as I did I located Mr. Gill on lot two, section seventeen, township forty-four, range twenty-one. Gentlemen of the jury, I started here at the north end of the island and ran down here according to the Government field notes, taking the same distances and course as the original field notes to a point down here. From here I had a flag on the lower end of La Costa island to the place of crossing. From there I measured a base line to this point here, and took an observation from Caya Costa here over there to the lower end of lot two of section thirty-two. I got a means of conveyance here, and meandered the beach along the western shore of Caya Costa island to the south boundary of section eighteen, and thence running east to the water I suppose it is Charlotte Harbor in there. There is a *bite* in there before you get to it. I didn't take any measurements from this. Well, where you see this little arm of water in there it extends much further and comes in here twice on this line; and then from here extends a line due east to the east side of Caya Costa on the south boundary of section eighteen, and extending that line 40 it cut off the point of Gill's Key, the lower point of Gill's Key. Here is lot one, and here is lot two, the lower part of Gill's Key is in section twenty, lot two is all in section seventeen, and I find that Gill's island is about due south of Point Blanco.

Motion to strike.—Counsel for complainant—move the court to strike this testimony of witness as to the survey: *first*, because it seeks to vary the Government survey; *second*, because it shows on its face to have been a private survey.

The COURT: The Government survey always prevails unless shown by clear and convincing evidence that it is wrong. That will be a question for the jury.

A. Lot six and nine of section eighteen lie nearly due west of the island Gill is on. I located Gill's Key by a survey or triangulation from the southern boundary line of section eighteen, and by protracting that line to the key that Gill occupied. I made no complete survey of the island, but placed a flag on it. I have not since made a survey of the island, but according to my survey Gill lives on lot two, section seventeen, township forty-four and range twenty-one.

Cross-examination.

By Mr. HAMPTON:

From the southern boundary of Caya Costa, Palmetto Key is the first island going north, and the next one of any consequence is Joseffa. There is no island north of there except Mundunbo, and I am not sure what section it is in. I have never surveyed section eight, and I could not tell anything in regard to that. Standing on the lower end of Joseffa island I should judge that Palmetto

Key is almost due west from it, but the whole island lies a little south of west. The lower end of Joseffa is in section seventeen, or it might be in sixteen.

Q. Now, at the time this suit was instituted, or about the time, were you employed by me to make a survey of this land, were you not?

A. Yes, sir.

Q. And I asked you to locate this island for me, the cross
41 section. Did you not report to me——?

Objected to. Counsel for defendant object to the question as not in legitimate cross.

Objection is overruled: To which ruling of the court the defendant by counsel then and there excepted.

At that time I reported to Mr. Hampton that I had located the island from a point on Joseffa island, as I didn't have the Government field notes at that time, but started at a point known to me and at which we had always taken on Joseffa island as a Government base, and according to that point I surveyed from the Government field notes. From the lower end of Joseffa island and a triangle to this key I reported to you that you would find it in section eight, which you will. While surveying this island the first and second times I had no conversation with Mr. Gill; I didn't see him at all. This letter dated November the 4th, 1905, is in my handwriting.

And thereupon counsel for complainants offered the above identified letter in evidence; there being no objection the said letter was filed in evidence and marked *Complainants' Exhibit 7*. (See page 41).

I have the field notes at home which I used in making this survey, and they are practically the same as to the triangulation as to the point of beginning. The variation of the position in the field notes is two degrees and forty minutes east, as near as I can remember. I know the handwriting of Col. Isaac H. Trabue; he was an attorney for Mr. Gill in this case.

Q. I will read you from page sixteen of the Bill of Exceptions containing your testimony as prepared by Colonel Trabue.

42

PL'FF'S EX. #7.

NOVEMBER 4TH, 1905.

Hon. R. B. Leak, Fort Myers, Fla.

DEAR SIR: Your favor of the 1st instant received, and from what you say therein we conclude that Gill will admit that the correct description of Palmetto Key is lot 1 of section 8; if this is true we do not understand how he can maintain his case, for it is simply a question of identification of the land.

We herewith enclose you a plat received from the Land Office which we will thank you to examine and advise us whether or not

the Government survey shown there agrees with the survey made by you.

Please hurry this plat back to us as we desire to have a correct certificate put on it by the Receiver of the Land Office.

Yours very truly,

DAVIS & HAMPTON.

Answer.

Mr. Gill will not dispute the survey as made from Pine Island to Useppa as locating it in sec. 8. He will contest that the same island, Palmetto Key, was differently located by a different survey made by the U. S. from La Costa Island, and that the island located in sec. 8 by one survey was located in sec. 17 by the other. Have just returned from a 7 days' trip South, and arrived home 43 this A. M. Rec'd telegrams upon my arrival. The map is already certified to, and I return same.

R. B. LEAK.

Endorsed on back: Filed in open court this 26th day of Feb. 1908. W. M. Hendry, Clerk.

and Mr. Hendry, and settled by the Judge for the last trial, I will ask you to state to the jury if this is your testimony on the former trial of this case?

Objected to. Counsel for the defendant object to such testimony for the purpose of impeaching the witness.

The COURT: Is there something to impeach his present testimony?

Mr. HAMPTON: Well, I don't know that it is. I am going to ask him if he said this. (Reads to witness):

"I am county surveyor of Lee county, Florida. I took these field notes or a copy of them to locate Palmetto Key, or what is called Palmetto Key, from the south end of Joseffa island; found no marks of any kind on the south end of Joseffa island. I located Palmetto Key, or what is understood as Palmetto Key, from the south end of Joseffa island; the island I located from the south end of Joseffa island was in section eight, township fourty-four south, range twenty-one east, but I had no point of bearings or no marks but the field notes. Mr. Gill, the defendant, lives on an island known and called Palmetto Key, or an island south of Point Blanco, according to the plat or field notes. From this survey or location, Palmetto Key or the island known and called Palmetto Key is in section eight, township fourty-four south, range twenty-one east."

Did you say that?

A. I think the above is somewhere near my testimony, but I don't remember about the beginning of the survey there. I think I had the Government surveys with me at the time I made these surveys. I don't remember that I testified that according to the maps in evidence and the field notes and plat of this island that

44 Mr. Gill lives in section seventeen, township forty-four and range twenty-one. There is some variations from year to year. This land was presumably in its initiatory survey located from the mainland, undoubtedly. I would not say that the field notes said start from the mainland, for the preamble to it is not in these field notes. The second survey that I made was not under the authority of the United States.

Redirect examination.

By Mr. HENDRY:

My recollection is that the variations which I took were the true variations, as I had taken by bearings only a short time before that from Polaris, the North star, as I had been doing some work for the Government, that is one reason; and another reason was that I retraced the line on Capitiva island from which the initial point of survey to the Caya Costa and the Key was made. It was my opinion that it was necessary to use this variation to get the correct survey.

Recross-examination.

By Mr. HAMPTON:

We test our instruments almost every time we run out a township or section, as we find the changes. Sometimes across the river, on the other side, we begin and find two section corners that will prove it. To test it we run a true line from one section to another to see what the variation is. At a point ten miles from there you may have to run on a different line from that of the Government survey. As well as I remember very nearly ever-eight years, in some localities, the variation goes east of north, and then turns back. In this particular location it is on the decrease in variation now. That was in 1907, and the true variation as near as I can remember was two thirty-two and a half, and it goes on decreasing, and then turns back north, and may go west of north.

45 Redirect examination.

By Mr. HENDRY:

Q. Professor, will you please examine that plat and state the location of lot one, section eight?

A. According to this plat (Exhibit No. 4)?

Q. Yes, in reference to the south of Point Blanco, what direction is it?

Objected to. Counsel for complainants object to the question as irrelevant and immaterial; seeks to vary the Government plat; and is not in cross of anything in the examination in chief.

The COURT: The plat will show what direction it is.

(Question withdrawn by counsel for defendant.)

Offered in evidence.—The defendants offer in evidence a certified copy and exemplification of the coast chart showing the Florida

posts from St. Carlos Bay and including Charlotte Harbor, certified to by Oscar S. Straus, Secretary of *Commission* and Labor.

Objected to. Counsel for complainants object to the introduction of said chart: *first*, because it — irrelevant and immaterial; *second*, because it is a coast chart and refers exclusively (as its name indicates: "B a map of the harbor showing the depth of water") and refers only to the location of the channels, and has no reference whatever to land titled.

Objection overruled. Plaintiffs except.

And thereupon the court recalled J. M. CRUMPTON for further examination, as follows:

I am not connected with the geodetic coast surveys, but I am familiar with what it is, and in my judgment the location of the islands by that chart (Showing witness chart above referred to and offered in evidence by defendants) are physically correct. My opinion is that the location is correct, but they don't give the minor things of that kind.

Objection is overruled. The last above objection of counsel for complainant is overruled. Chart filed in evidence and marked Exhibit 3.

46 And thereupon the defendant to further maintain the issues on his behalf, produced and caused to be sworn as a witness WILLIAM DEMERE, who testified as follows:

My name is William Demere. I live at Punta Gorda. I am a boatman; have lived at Punta Gorda for about eighteen years and am familiar with Charlotte Harbor. I know that Mr. Gill resides on an island which is about a mile south of Point Blanco. I have traveled up and down there for seventeen or eighteen years, and as near as I can come at it, it is about a mile south of Point Blanco to where Gill lives. Mr. Gill has been on that island twelve or fourteen years, to the best of my recollection. The nearest point on Cayo Costa island would be a little south of west to where Gill lives, to the best of my recollection. Mr. McAdow and Mr. Ware live on La Costa island. Mr. Ware's place, according to my recollection, would be to the west of Gill's island.

Thereupon plaintiff move the court to strike the foregoing, because it varies the Government survey.

Motion denied. Plff- excepts.

Cross-examination.

By Mr. HAMPTON:

I do not think there is a small island of eighty or eighty-five acres south of west of Palmetto Key. Up to a short while ago Gill lived on what is known as Palmetto Key, but I have always heard it called Gill's Key. I don't know that location. Point Blanco is northwest from Gill's island, but the southern part is not southwest from it. Punta Blanco is not very far, as it runs back pretty close to La Costa island. Point Blanco is west of La Costa island, prob-

ably a little northwest. Standing on Point Blanco and looking south you cannot see the north end of La Costa island to the south of you on account of the other islands. There are some mangrove islands there,—lots of them. There is no island south of Point Blanco, it — about west of it, or southwest, somewhere along in there.

Redirect examination.

By Mr. HENDRY:

I think Point Blanco is more to the northward and western. I was confused just now in reversing the point of the compass there, because I knew the direction of that island, and the location of it is south of the point; there is no question about that.

And thereupon, with the permission of the court, the complainants, to further maintain the issues in their behalf, recalled J. M. CRUMPTON, who testified as follows:

Direct examination.

By Mr. HAMPTON:

I was employed by the Government at the time of these surveys, and I can state that the variation in the Charlotte Harbor district is one degree and thirty-eight minutes east; and it has been on the decrease nearly three degrees and five minutes for the last eight or ten years. If a man should have used two degrees and forty minutes in 1905 it would not have been the correct variation. If a man applies the variation wrong: that is, uses it *positive* where it should be *negative* in the case of a six-mile survey, like that was, it would place him a mile out of the way. This Exhibit No. 3 is a coast chart representing Charlotte Harbor and other portions; this chart was used in my office to designate the depth of water and the harbors, though we have larger charts more minutely and on a larger scale. This chart has no connection in the least with section lines, and is not made with reference to the same. It is a physical outline of islands, channels, and coasts, etc. In 1895, at the time this chart was made, it showed the compass variation to be two degrees and twenty minutes east.

Cross-examination.

By Mr. HENDRY:

This map shows correctly the physical locations of the lands and the surrounding waters.

Redirect examination.

By Mr. HAMPTON:

This chart does not show an island a mile or two south of Palmetto Island containing eighty-four acres in area.

Recross-examination.

By Mr. HENDRY:

This chart does show land south of Point Blanco; the islands to the northern or northeastern part might be Mundunbo of Patric-o.

And thereupon the court took a recess till two o'clock p. m.

And thereupon the defendant, to further maintain the issues on his behalf, produced and caused to be sworn as a witness E. O. CORSA, who testified as follows:

Direct examination.

By Mr. HENDRY:

My name is E. C. Corsay, C-o-r-s-a; I live at Punta Gorda, where I have been living nearly six years. I am acquainted with Charlotte Harbor and the land around Joseffa island, and I know where Point Blanco is. As a pilot for thirty-five years in this locality I am familiar with the location of the islands. I know Mr. 49 Charles H. Gill, the man who lives in Punta Gorda. I know the island on which he lives, which is about a mile south from Point Blanco. There were some Cubans living on it, and the lower end of Joseffa is pretty near east. La Costa island, that is a large island that reached from Capitiva pass up to Boca Grand. There is a string of small islands along there. With this (def't's exhibit No. 2, Coast Chart) I can go anywhere. On Exhibit No. 3, Mr. Gill lives right here, gentlemen of the jury; and Point Blanco is due north from there. Here is a long strip of sand that runs down by Boca Grand. There are two islands northeast of Point Blanco, Mundunbo and Patricio. These islands are about the *the* size of the one on which Gill lives, but the mangroves on it makes a bigger show. Ever since I have been out here, about six years, I have known Mr. Gill to live on that island.

Cross-examination.

By Mr. HAMPTON:

I am familiar with the place called Charlotte Harbor, and on this plat, exhibit No. 4, here in section seventeen, is a spot containing eight and three hundredths acres. There is a sand bar down here that I don't know anything about.

Q. Now, from Palmetto Key due south is there any other island containing eighty-four and forty-two hundredths acres, or anywhere near the size of Palmetto Key, due south for a distance of a mile or two miles?

Objected to. Counsel for defendant object to the use of the name Palmetto Key by counsel for complainants.

The COURT: It has been testified to here as commonly being called Palmetto Key.

A. There is no island about a mile or two miles south of Point Blanco the size of Palmetto Key or Gill's Island. A little to the

west of it there a little of La Costa island. Here is the Government chart on that coast, and we have to run by that.

50 Thereupon plaintiff moved the ct. to strike the foregoing testimony because it seeks to vary the Government survey.
Motion denied. Plff- excepts.

And thereupon the defendant, to further main- the issues on his behalf, produced and caused to be sworn as a witness Capt. M. JOHNSON, who testified as follows:

Direct examination.

By Mr. HENDRY:

My name is M. Johnson. I have lived at Ft. Myers for about twenty-three years, and am at present a real estate man. I have been a licensed pilot for eighteen years and am as familiar with the localities around Charlotte Harbor as I am the road home. I have seen Mr. Gill in the court room here, but have never met him; I know where he lives, and also the location of Point Blanco. Mundunbo island lies northeast of Point Blanco, and Palmetto island is about a mile south. It is marked here on this map, Exhibit No. 3, as Palmetto Island, and I have always known Mr. Gill to live on that island. I don't know just exactly where he does live, but I am told that he has an island right west of Joseffa and south of Point Blanco.

Cross-examination.

By Mr. HAMPTON:

There is only one island down in that harbor named Palmetto; I don't know what township it is in. I should call that Palmetto Key in section seventeen; I say this from its location and the distance from Point Blanco. I base my judgment from the distance, and if that plat says that Palmetto Key is east of Point Blanco or northeast of Point Blanco, the plat is wrong.

Motion to strike.—Counsel for complainants move the court to strike the statement above made, because it seeks to vary the Government survey.

Motion overruled. To which ruling of the court complainants by counsel then and there except.

51 Motion to strike.—It is also moved to strike the testimony of Corsa and Demere upon the same grounds last above stated. Which said motion is overruled, and exceptions taken by counsel for complainants.

Redirect examination.

By Mr. HENDRY:

I know the distances between the land surveys and the coast surveys. I am certain that the coast surveys are correct and that

the land surveys are incorrect. We have to *sale* by them, and the channels have to be absolutely correct.

Motion to strike.—Counsel for complainants move the court to strike the statement above made, because it seeks to vary the Government survey.

Motion overruled. To which ruling of the court complainants by counsel then and there except.

And thereupon the defendant, to further maintain the issues on his behalf, produced and caused to be sworn as a witness P. L. McAdow, who testified as follows:

Direct examination.

By Mr. HENDRY:

My name is P. L. McAdow. I live in Ft. Myers. I lived in the locality of Charlotte Harbor near Point Blanco and Palmetto Key for about six years. I have a home there on La Costa island. I live probably about a mile northwest, something like that, from Mr. Gill. He lives on a key known as Palmetto Key. According to this map, gentlemen of the jury, he lives right about there, on that island. One, five and six are my homestead numbers, but I don't know the township and range, though my deed would show that, and is in section eighteen. Mr. Gill lives in section seventeen. Point Blanco is right here, lot one, section seventeen; the whole island is known as Point Blanco, but the point is white. Mr. Gill lives about south from Point Blanco, about a mile.

Motion to strike.—Counsel for complainants move the court to strike the statements above made because they seek to vary the Government survey.

Motion overruled. To which ruling of the court the complainants by counsel then and there excepted.

Cross-examination.

By Mr. HAMPTON:

There is nothing over here but a mud flat (referring to Sec. 8) and if Palmetto Key is there all of my testimony is wrong, but it is not there. If it is there my testimony is wrong, but if it is not there my testimony is right. There is nothing there in section eight as shown on that plat at all according to the common usage and the Government survey. I am not a surveyor, but there is nothing there but marsh. I am no surveyor, but helped carry a chain over this land.

Redirect examination.

By Mr. HENDRY:

Q. Is your land where you reside, Mr. McAdow, and the land that you have a deed for, *is* correctly numbered according to the Government survey?

Objected to. Counsel for complainants object to the question because the witness has already testified that he is not a surveyor, and the deed would be the best evidence.

Question withdrawn.

And thereupon the defendant produced and caused to be sworn as a witness H. A. WARE, who testified as follows:

Direct examination.

By Mr. HENDRY:

I live at Fort Ogden, but I have got a home on La Costa island. I am acquainted with that locality, and know where
53 Mr. Gill lives when he is down on the bay. Mr. Gill lives on lot two of section seventeen. Point Blanco is right there in section seventeen, a little northwest of where Mr. Gill lives. My house is right there; my place is lot six and nine, and Mr. Gill lives due east. His north line is my north line, and his south line is my south line, and I am exactly due west from him. According to this map Mr. Gill lives in section seventeen. The numbers of my land are lots six and nine, section eighteen, township forty-four, south of range twenty-one east. This is section eighteen here on this map and he comes right across over here west of me. If here is section eighteen right over here would be section seventeen where Mr. Gill lives, which is about south of Point Blanco.

Cross-examination.

By Mr. HAMPTON:

I don't know that I have always heard the island that Gill lives on called Palmetto Key, though lately it has. I have never seen a Palmetto Key in section eight. There is an island out there by the name of Mundanbo, and that is about the shape of it, but Palmetto Key is not there. I base my opinion on my map which says that Palmetto Key should be shown in section seventeen instead of section eight. There is only one Palmetto Key that I know of. Mundunbo lies right east of Point Blanco and Juseffa is right out there; and Mundunbo is northwest. According to my idea Juseffa should be right off up here and Mundunbo right up here. I have been around here for twenty-five or thirty years. According to my idea of the way this map lies it is wrong. I am not a surveyor and have never surveyed these lands.

Redirect examination.

By Mr. HENDRY:

My idea is not that the whole map is wrong, but that part,
54 of Mr. Gill's was shown on it; and that Mr. Gill's island on the others are correct.

Motion to strike.—Counsel for complainants move the court to strike the testimony of the witness because the same is immaterial

and irrelevant, and because it seeks to change the accepted Government survey and plats.

Motion denied. To which ruling of the court complainants by counsel then and there except.

And thereupon, with permission of the court, the complainants in rebuttal call R. B. LEAK, who testified as follows:

Direct examination.

By Mr. HAMPTON:

I testified this morning that in making one survey I located this island in section eight; and subsequently at another survey at which time I started at the end of Patricio island I located the same island in section seventeen, which is correct, and each time I located the same island. I do not think my statement was that if Palmetto Key existed in section eight as I first found it that then there is no island in section seventeen, and that if Palmetto Key exists in section seventeen, the second time I found it, there is no island in section eight, but in making the survey I stated if Juseffa island was located in a certain section my survey from that island located Gill's island in section eight. Now if section eight is west of Juseffa island or southwest, what I have known as Juseffa island, Gill's island lies west of Juseffa island about thirty chains distance southwest. The same key does not exist in both sections, eight and seventeen. There are some islands there that have palmettoes on them. I think Mundunbo has about eighty-four and forty-two hundredths acres on it, and is northwest of Palmetto Key, or Gill's Key. When I located Gill's possession in section seventeen I did not locate Mundunbo, though I could see it at the same time. When I located Gill's key in section eight I didn't locate Mundunbo island.

Cross-examination.

By Mr. HENDRY:

I should like to explain something to the jury here that they asked me this morning in regard to some questions that I testified to a year or two ago. When I testified it was fresh on my memory and whatever I testified to the matter is right.

Q. How many acres, Mr. Leak, has Mr. Gill got that he lives on?

A. I don't know how many acres there are in it, but if you want my observation in regard to it, or what I think about it—

Objected to. Counsel for complainants object to the question as out of order.

Objection sustained. "That would not be proper."

A. I have been over it, but I have not made an accurate survey of it. I have examined Mundunbo island a number of times and it is about eight-tenths as large as this island on which Gill lives. Assuming that Gill's key as I have located it in my survey for him to be in section seventeen, in order for my survey to be cor-

rect this plat need not be wrong; not in conjunction with this body of land that is located right where it is; the typography of that body of land. This map in exhibit No. 4 shows Gill's key to be in section seventeen. I located this island at one time in section eight from the survey I made at Juseffa. Then if this island is located in section seventeen this plat is incorrect, as far as
56 Gill's island is concerned and it is located north or east of Point Blanco, then this is incorrect as Gill's island.

Motion to strike.—Counsel for complainants move the court to strike the testimony of witness because it seeks to vary the Government survey, and is immaterial and irrelevant.

Objection is overruled. To which ruling of the court the complainants by counsel then and there except.

Defendant rests.

And thereupon the complainants produced and caused to be sworn as a witness A. W. TAYLOR, who testified as follows:

Direct examination.

By Mr. HAMPTON:

I have been on section eight, and standing on that key and looking south there is no island as large or larger than that key, or the same size south of it. The first island you see is La Costa. There can be but one island in controversy here. At high tide you cannot see any land at all down here toward section seventeen.

Cross-examination.

By Mr. HENDRY:

On this map Exhibit No. 4 here is Point Blanco, and here is La Costa. Here is Palmetto Key, which is south of Point Blanco. According to this plat lot one of section eight is north from the south extremity of Point Blanco.

Redirect examination.

By Mr. HAMPTON:

If the coast chart that has been introduced here is correct this other map must be wrong, both can't be correct. I think there has been only one survey made by the Government of this Charlotte Harbor. If they give you the survey they will always give

57 you the last notes.

It is admitted by the counsel for complainants that Charles H. Gill made a homestead entry on lot two, section seventeen, township forty-four south, range twenty-one east, five years previous to the 25th day of June, 1901.

Counsel for complainants move the court to strike all the testimony as to the existence of Palmetto island in section seventeen, and moves the court to instruct a verdict for the complainants, first,

because the undisputed evidence shows that the island in controversy has been successively located by two or more surveys, the first, and original survey, locating and platting said island in section eight; second, because the only evidence introduced to show any physical identification is contrary to the Government survey, and is admitted to be that of a private survey; third, because the admitted evidence in this case shows that there is only one Palmetto island on which the defendant Gill is living and the testimony of witnesses familiar with the locality no more than a private survey can be introduced to impeach the Government survey.

Motion overruled. To which ruling of the court the complainants by counsel then and there excepted.

(Testimony closed.)

The said parties having concluded and submitted their evidence the court thereupon gave the following instructions to the jury at plaintiffs' request:

1st. The court instructs the jury that the fact that the defendant may have made improvements on the land or invested his money and spent his time in the improvement of the land, should not be allowed to create a sympathy for the defendant in the minds of the jury and if you believe from the evidence that the plaintiffs have made their case and shown their right to recover the land under the instructions given you by the court you should find for the plaintiff. The law provides a way whereby the defendant
58 may compel the plaintiff to pay him for the improvements put upon the land.

2nd. If the plaintiff in this case has introduced a map or plat certified to by the Commissioner of the General Land Office as a true and literal exemplification of the township plat of survey to which it purports to relate now on file in his office then the court charges you that this map or plat is presumably correct, and if the defendant contends that it is incorrect it devolves upon him to prove its correctness.

3rd. If there were two surveys made by the Government of the township in which the land in controversy is situated and the Government adopted one of those surveys as the true and proper survey and platted it accordingly, and if both parties to this suit claim lands in the same township under titles from the Government obtained after the said township was surveyed and platted they are each bound by the established and accepted survey and the Government plat of the same.

7th. If you find from the evidence that both parties claim from the U. S., I charge you that the official plat and field notes adopted and approved by the U. S. must control as between the parties and neither party can directly or indirectly question the correctness of the official plat and field notes delineating the survey of the township.

And thereupon the plaintiffs requested the court to submit to

the jury the following instructions, which were refused, and to which refusal plaintiffs then and there excepted.

4th. If the plaintiff- in this case *has* introduced a map or plat prepared by the United States Surveyor General for Florida, showing that lot 1 of section 8 in township forty-four (44) south, of range twenty-one (21) east, is on Palmetto Key, and if the Surveyor General has certified that the map or plat so introduced is strictly

59 conformable to the field notes of the survey thereof of file in his office and that those field notes have been examined and approved and if it is shown to you that that map or plat has been certified and approved by the Commissioner of the General Land Office, then the court charges you that the map or plat is presumably correct, and if both parties in this suit have derived title from the Government of the United States since said survey and the making of said plat they are each bound by the same.

5th. The court charges you that if the defendant claims title by patent as a homesteader to lot 2 of section 17 township 44 range 21, and if a map and plat certified to by the Register of the Land Office has been introduced showing that the land described in defendant's patent is not on Palmetto Key, then the presumption is that the Government did not intend to give defendant a homestead on Palmetto Key.

6th. The survey actually made by the U. S., whatever it may be, must control between the parties, and if you find that in order to place the land of the defendant Gill in sec. 17 Tp. 44 S., R. 21 E. you must find a variance with the official plat and field notes of the survey adopted by the U. S. Government, I charge you that you cannot find for the defendant as he will not be allowed to thus indirectly attack the validity of the official survey.

And thereupon the court, at the request of defendant, gave to the jury the following instructions, to the giving of which charges the plaintiffs then and there excepted.

2nd. Under the defendant's second plea the controversy between the parties is as to the physical identification of the land upon which the defendant Gill in fact resides and has his improvements, and if you find from the evidence that the defendant does in fact reside upon and have his improvements upon lot 2 in section 60 17, township 44 S., Range 21 east, then you will find a verdict for the defendant, and if you find from the evidence that said defendant does not in fact reside upon and have his improvements on lot one of section 8, said township and range, you will find a verdict for the defendant.

4th. I further charge you that before you can find for the plaintiffs you must be satisfied from the evidence introduced that the defendant was at the time of the commencement of this cause of action in the actual possession of lot one in section 8 township 44 south, range 21 east, and that the plaintiff- were entitled to the possession thereof and had a better title thereto than was had by the defendant.

5th. In locating the properties in controversy and in determining

the issue in this case you may consider all the evidence, which you shall believe, introduced by the parties hereto from and by which you may fix the actual locations thereof, and in this connection you may consider the testimony of the witnesses testifying from personal knowledge and observation of actual location, in connection with and with reference to the points of the compass.

And thereupon the defendant requested the court to submit to the jury the following charges, but the court refused to give said charges, to which refusal the defendant then and there excepted.

1st. If you find from the evidence that the defendant, Chas. H. Gill, does in fact reside upon and has his improvements upon an island that lies south from the outward extremity of Point Blanco and east from lots 6 and 9 of section 18 on the large island called Cayo Costa, then it will be your duty to find for the defendant.

3rd. The plaintiffs have brought this suit against the defendant, Chas. H. Gill, to recover possession of lot one in section 8, township 44 south, range 21 east, Lee county, Florida, and allege in their declaration that the defendant is in the possession of said lands.

Now, if you find from the evidence introduced in this cause
61 the said lot one, section 8, twp. 44, range 21 east, is northeast of Point Blanco and that the defendant Gill resides upon and has his improvements on an island or tract of land which lies south of said Point Blanco, you will find a verdict for the defendant.

And thereupon the court of his own motion submitted to the jury the following charges, to the second of which charge the plaintiffs then and there excepted, and which said charges together with the foregoing constitute all of the charges submitted to the jury at the trial of said cause.

This is an action of ejectment by the pl'ffs Graham and Hampton against the d'f't C. H. Gill for the possession of a tract of land described in the declaration as lot 1 sec. 8 Tp. 44 S. of R. 21 E. which from the undisputed evidence is an island in the waters of Charlotte Harbor. To this declaration the defendant has filed two pleas, one denying the possession by him of the island claimed by the pl'ffs, and another plea of not guilty, which denies the right of the pl'ff- to the land claimed by them, and their right to mesne profits, that is compensation from the d'f't for the use and occupation of this land.

If you find that the d'f't was not, at the beginning of the suit, in possession of lot 1 of sec. 8, you should find in his favor, regardless of the real ownership of the land.

If you find that he was in possession of this lot, but fail to find from a fair preponderance of the testimony that the pl'ffs owned title to the land at the beginning of the suit, you should find in his favor without regard to the real ownership of the land, because in an action of this kind the pl'ff must recover on the strength of his own title and not on the weakness of that of the def't, but when the defendant denies possession of the land claimed and the pl'ff proves title to the land, the burden is on the def't to sustain his

plea of lack of possession of the land at the beginning of the suit.

62 It is admitted in evidence that both parties claim title directly or indirectly from the U. S. Government, and I charge you as a matter of law that where both parties claim title from the Government, and there is a dispute as to the correctness of the official survey of the Government as shown by the plat and field notes, the official survey must prevail and cannot be suspended by any number of private surveys, but if both parties claim through the Government survey, and the dispute is as to the physical location of the land, and the official map or plat and the field notes do not agree, the map or plat will take precedence. In other words, in case of a discrepancy of that kind the map or plat will govern.

From the evidence in this case applying to the facts testified to the law has — given you these instructions, it is for you to determine.

1st. Was the d'f't in possession of lot 1 sec. 8 tp. 44 R. 21 E. at the time the suit was commenced, and if so,

2nd. Have the pl'ffs shown by the evidence a better title to the lot than the d'f't.

If you find both these facts in favor of the pl'ff-, then find in their favor and award them such compensation for the use and occupation of the land by the d'f't as the evidence shows them to be entitled to; and if you find that the pl'ffs are entitled to the land, and entitled to mesne profits, you should award them interest on the amt. of mesne profits at 8 per cent from the date of the commencement of the suit.

If you find either or both of these facts against the pl'ffs, then find a verdict in favor of the d'f't. You are the judges of the weight and sufficiency of the evidence and of the credibility of the witnesses.

Find your verdict from the facts as you believe them to have been established by the proof, without regard to any outside consideration whatever. In saying that the pl'ffs must show a better title than the d'f't to the land in controversy, I refer to the description of the land as contained in the declaration. The question before you is, in regard to this particular is, who is the owner of lot 1 section 8 Tp. 44 R. 21. There is no discrepancy in the declaration describing the land as Palmetto Island or Palmetto Key, and you may consider any testimony offered as to the discrep't by name of the land claimed by the pl'ff- if it will assist you in any way in locating the land in controversy, as described in the declaration the land is lot 1 in section 8 Tp. 44 R. 21 S. & E.

The said cause having been submitted to the jury by the court under its charges, and the jury having rendered a verdict for the defendant against the plaintiff — at the time of the rendition of the said verdict requested the court to enter an order extending the time for filing motion for new trial and arrest of judgment, which said motion and the order thereon is in words and figures following, to-wit:

"In Ct. Ct. Lee County, Fla.

GRAHAM & HAMPTON

vs.

C. H. GILL.

Ejectment.

Now comes the pl'ffs in the foregoing cause in open court at the time of rendition of verdict — represents unto the court that this term of court is on the eve of adjournment and that sufficient time cannot be allowed pl'ffs to prepare and present their said motion for arrest of judgment and new trial, wherefore pl'ffs move the court to extend the time for filing and considering said motion until M'ch 11, 1908.

Feb'y 26, 1908.

F. C. ALDERMAN &
H. S. HAMPTON, *For Pl'ffs.*

64

Order.

Motion granted, and Plaintiffs allowed until March 11, 1908, in which to prepare and present their motion for arrest of judgment or for new trial, or for both.

Done and ordered in open court this 26th day of February, 1908.

J. B. WALL,
Circuit Judge.

And thereafter, to-wit, on Feb'y 29, 1908, within the time allowed by the court the said plaintiffs filed a motion for new trial, which is in words and figures following, to-wit:

In the Circuit Court for Lee County, Florida.

GRAHAM & HAMPTON

vs.

C. H. GILL.

Ejectment.

Now comes the plaintiff in the foregoing cause and within four days from the rendition of the verdict and within the time allowed by the order of the court moves the court to set aside the verdict and to grant a new trial of said cause upon the following grounds, to-wit:

1st. Because the said verdict is contrary to law.

2nd. Because said verdict is contrary to the evidence.

3rd. Because by the testimony of both plaintiffs and defendant there is but one island involved in this proceeding known as Pal-

metto Key, therefore testimony seeking to show the said island in section 17 varies the Government survey of said township.

4th. Because the court erred in allowing the defendant to file in evidence over objection of plaintiffs the coast survey chart or plat.

5th. Because the court erred in refusing to strike the testimony of the witness R. B. Leak as to the location of lot one or Palmetto Key by a second survey.

6th. Because the court erred in refusing the request of plaintiff- to strike the testimony of William Demere as to the location of the said island known as Palmetto Key.

7th. Because the court erred in refusing, at the request of plaintiffs, to strike the testimony of the witness E. A. Corsa as to the location of the island known as Palmetto Key.

8th. Because the court erred in refusing to strike the testimony of the witness M. Johnson as to the location of the island known as Palmetto Key.

9th. Because the court erred in refusing at the request of plaintiffs to strike the testimony of the witnesses N. Y. McAdoo and H. A. Ware as to the location of the island known as Palmetto Key.

10th. Because the court erred in refusing the motion of plaintiffs made at the conclusion of the testimony in the cause to strike all testimony tending to vary the plat or field notes filed in evidence of the original Government survey.

11th. Because the court erred in refusing to give at the request of plaintiffs the fourth, fifth and seventh instruction- asked.

12th. Because the court erred in submitting to the jury the second, fourth, fifth and — instructions asked by the defendant, also the second instruction of his own motion.

13th. Because of divers other errors committed in the trial of the said cause in the refusal and admission of testimony over objection of plaintiffs.

H. S. HAMPTON,
F. C. ALDERMAN,
Attorneys for Plaintiffs.

On the 10th day of March, 1908, after due notice given counsel for defendant and service of a copy of said motion the same — on to be heard by the court, and the court did overrule the same as follows:

"Motion overruled, plaintiffs allowed sixty days within which to prepare and settle a bill of exceptions, to which the plaintiffs then and there excepted."

And thereupon on the third day of April, 1908, the said plaintiffs served notice on counsel for the defendant that the said bill of exceptions would be presented to this court for settlement on April 11, 1908, and at the same time served a copy of assignment of errors presented by said bill of exceptions upon counsel for defendant, the said notice and the said assignment of errors being in words and figures following, to-wit:

"In the Circuit Court for Lee County, Florida.

GRAHAM & HAMPTON

vs.

C. H. GILL.

The defendant and his counsel will take notice that the plaintiffs by counsel will on Saturday April 11th, 1908, apply before Honorable J. B. Wall, Judge of said court, for a settlement of the bill of exceptions in the said cause at Tampa, Florida, two o'clock P. M. of said date.

This April 3rd, 1908.

H. S. HAMPTON,
F. C. ALDERMAN,
Attorneys for Plaintiff.

Service of a copy of the foregoing notice together with a copy of the assignment of errors presented in and by said bill of exceptions is this day acknowledged. This April 4th, 1908.

JOHN W. BURTON,
Of Attorney for Defendant.

67

In the Circuit Court for Lee County, Florida.

GRAHAM & HAMPTON

vs.

CHAS. H. GILL.

Now come the plaintiffs in the foregoing cause and at the time of applying for settlement of bill of exceptions in said cause makes the following assignment of errors presented in and by said bill of exceptions.

1st. Because the said verdict is contrary to the evidence.

2nd. Because the court erred in overruling motion for new trial of plaintiffs.

3rd. Because the court erred in allowing the question to witness Gill on page 11 as to whether or not he was living on the land the patent calls for.

4th. Because the court erred in allowing over objection of plaintiffs the testimony as to a second private survey by the witness R. B. Leak.

5th. Because the court erred in allowing in evidence the plat of the coast chart as defendant's exhibit No. 3.

6th. Because the court erred in refusing to strike the testimony of the witness Demere.

7th. Because the court erred in refusing to strike the testimony of the witness Corsa.

8th. Because the court erred in refusing to strike the testimony of the witness M. Johnson.

9th. Because the court erred in refusing to strike the testimony of McAdow.

10th. Because the court erred in refusing to strike the testimony of the witness H. A. Ware.

11th. Because the court erred in refusing to strike the testimony of the witness Leake on page 34.

12th. Because the court erred in refusing to submit to the jury the instructions designated in the motion for new trial.

13th. Because the court erred in giving to the jury the instructions objected to by plaintiffs and designated in the motion for new trial.

H. S. HAMPTON,
F. C. ALDERMAN,
Attorneys for Plaintiffs.

I further certify that the foregoing bill of exceptions contain- all of the evidence introduced in said trial, and I further certify that I have committed certain portions of the testimony in the form of questions and answers as it is considered indispensable to a proper understanding of the said testimony.

It appearing that the coast chart filed in evidence as defendant exhibit No. 3 cannot be reproduced and copied without great expense and inconvenience, thereupon by agreement of counsel it is ordered that the clerk of this court do forward said original coast chart, outside of this bill of exceptions, to the Supreme Court, and that the same may be considered as though it were incorporated in said bill of exceptions.

And inasmuch as the said several matters objected to or insisted upon and considered by the court do not appear by the record, the said plaintiffs did on the 11th day of April 1908, after the expiration of said term, by virtue of a special order herein made, propose this their bill of exceptions to the said judge and request him to sign the same, which, after due notice to the opposite party, is done this 11th day of April, A. D., 1908.

J. B. WALL, *Judge.*

On the 10th day of April, 1908, the plaintiffs filed their præcipe with the clerk of the circuit court for Lee county for writ of error in the words and figures following, to-wit:

"In the Circuit Court for Lee County, Florida.

J. M. GRAHAM and B. F. HAMPTON, Plaintiffs in Error,
vs.
CHAS. H. GILL, Defendant in Error.

Writ of Error to Circuit Court for Lee County, Florida.

The clerk of said court will please issue a Writ of Error in the above cause from the judgment of said court directed to the Judge

of the circuit court for Lee county, Florida, making the same returnable to the Supreme Court of Florida, to the 30th day of May, 1908, a day in the present term of said court, the same being more than thirty and less than ninety days from the date of said writ.

HILTON S. HAMPTON,
FRANK C. ALDERMAN,
Attorneys for Plaintiffs in Error.

On the 13th day of April, 1908, writ of error issued, which was duly recorded in the minutes of the circuit court in book No. 1 page 479, on the 13th day of April, 1908.

Writ of Error.

STATE OF FLORIDA, ss.:

The State of Florida to the judge of the circuit court of the Lee county judicial circuit of the State of Florida, Greeting:

Because in the record and proceedings and also in the rendition of judgment in a certain cause which is in our said circuit court before you, between J. M. Graham and B. F. Hampton as plaintiffs and Chas. H. Gill, as defendant, manifest error hath happened, as
70 it is said, to the great damage of the said J. M. Graham and B. F. Hampton, as by their complaint appear.

We, willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein rendered, you distinctly and openly send the record and proceedings aforesaid with all things touching them, under your seal, together with this writ, to our Supreme Court of the State of Florida, so that you have the same at Tallahassee on the 30th day of May, A. D. 1908, in our said Supreme Court to be then and there held, that, inspecting the record and proceedings aforesaid, our said Supreme Court may cause further to be done therein, to correct that error what of right and according to law should be done.

Witness, the Honorable Thos. M. Schackelford, Chief Justice of the Supreme Court, and the seal of the said Circuit Court, this 13 day of April, in the year of our Lord one thousand nine hundred and eight.

[Circuit Court Seal.]

W. M. HENDRY,
Clerk of the Circuit Court of Lee County.

On the 18th day of April, 1908, the plaintiffs filed their written direction to the clerk in the words and figures following, to-wit:

"In the Circuit Court for Lee County, Florida.

J. M. GRAHAM and B. F. HAMPTON

vs.

CHAS. H. GILL.

Now comes the plaintiffs in error in the foregoing cause and request the clerk for a transcript of the record in said cause for the purpose of filing the same in the Supreme Court of Florida, and hereby make the following written directions to said clerk for making up said transcript to-wit:

71 The Clerk will copy into and make a part of said transcript the following papers and proceedings, to-wit:

1st. The declaration of plaintiffs.

2nd. The pleas of defendant.

3rd. Verdict of the jury.

4th. Motion in arrest of judgment together with the ruling thereon.

5th. Judgment of the court upon the verdict.

6th. Bill of exceptions.

7th. Præcipe for writ of error.

8th. Writ of error and record thereof.

9th. These written directions.

10th. Assignment of errors.

The said clerk will recite the filing of the præcipe, issuance of summons, appearance of defendant and joinder of issue.

The said clerk will commence to make up said transcript on the 8th day of May, A. D., 1908.

H. S. HAMPTON &

F. C. ALDERMAN,

Attorneys for Plaintiffs.

On the 18th day of April, 1908, the plaintiffs filed their complete assignment of errors, which, with the service thereon, is in the words and figures following, to-wit:

"In the Circuit Court for Lee County, Florida."

GRAHAM & HAMPTON

vs.

C. H. GILL.

Now comes the plaintiffs in the foregoing cause and at the time of applying for a transcript of record, hereby make the following as a complete assignment of error upon which they intend to rely for reversal in said cause, to-wit:

72 1st. Because the said verdict is contrary to law.

2nd. Because said verdict is contrary to the evidence.

3rd. Because the court erred in allowing the question to witness

Gill on page 11 as to whether or not he was living on the land the patent calls for.

4th. Because the court erred in allowing over objection of plaintiff the testimony as to a second private survey by the witness R. B. Leake.

5th. Because the court erred in allowing in evidence the plat of the coast chart as defendant's exhibit No. 3.

6th. Because the court erred in refusing to strike the testimony of the witness Demere.

7th. Because the court erred in refusing to strike the testimony of the witness Corsa.

8th. Because the court erred in refusing to strike the testimony of the witness M. Johnson.

9th. Because the court erred in refusing to strike the testimony of the witness McAdoo.

10th. Because the court erred in refusing to strike the testimony of the witness H. A. Ware.

11th. Because the court erred in refusing to strike the testimony of the witness Leake on page 34.

12th. Because the court erred in refusing to submit to the jury the instructions designated in the motion for new trial.

13th. Because the court erred in giving to the jury the instructions objected to by plaintiffs and designated in the motion for new trial.

14th. Because the court erred in overruling motion in arrest of judgment.

15th. Because the court erred in entering judgment against the plaintiffs.

H. S. HAMPTON,
F. C. ALDERMAN,

Attorneys for Plaintiffs.

73 Service of a copy of the foregoing assignment of errors, together with a copy of the written direction is this day acknowledged. This 16 day of April, A. D. 1908.

JNO. W. BURTON,
Of Attorney- for Defendant.

I, W. M. Hendry, Clerk of the Circuit Court in and for the county of Lee, State of Florida, do hereby certify that the foregoing pages numbered from one to seventy-three inclusive contain a correct transcript of the record of the judgment in the case of J. M. Graham and B. F. Hampton, plaintiffs, against Chas. H. Gill, defendant, and a true and correct recital and copy of all such papers and proceedings in said cause, as appears upon the records and files of my office, that have been directed to be included in said transcript by the written demands of the said parties.

In witness whereof, I have hereunto set my hand and affixed the seal of said circuit court this 25th day of May, 1908.

[Imprint of Seal of Circuit Court.]

W. M. HENDRY,
Clerk of the Circuit Court for Lee County, Florida.

74 On the 11th day of December, 1908, the opinion of the Supreme Court of Florida in said cause was filed in the words and figures as follows:

In the Supreme Court of Florida, Division B, June Term, A. D. 1908, Lee County.

J. M. GRAHAM and B. F. HAMPTON, Plaintiffs in Error,
v.
CHARLES H. GILL, Defendant in Error.

TAYLOR, J.:

This is the second appearance of this case in this court. See *Gill v. Graham and Hampton*. — Fla. —, 45 South. Rep. 845. The defendant below brought the case here as plaintiff in error on the former appeal, and the judgment below was reversed and the cause remanded. Upon the second trial the verdict and judgment were for the defendant, and now the plaintiffs below bring it here for review by writ of error. There are fifteen assignments of error now presented to the court chiefly upon the admission of evidence at the trial. All of this evidence, without a detailed discussion of it, we think was properly admitted in identification of the island where the defendant Gill actually resided and of which he claimed possession, and was all of it admitted in conformity with the former decision in the case. We do not think that any of it tends to contradict or vary the official government surveys and plats of the territory involved, but on the contrary its tendency is to verify and uphold such surveys and plats, and the evidence in the case overwhelmingly shows that the verdict and judgment in favor of the defendant below was proper. In the former decision of the

75 case we said in substance that the sole controversy between the parties was as to the physical identification of the land upon which the defendant Gill in fact had his possessions,—whether he was in possession of an island in Section 17 lying south of a well defined landmark called "Point Blanco," and due east from the lots numbered 6 and 9 in Section 18 on an island called Cayo Costa,—or whether he was in possession of the island in Section 8 represented on the official government's maps as situated northeast of said "Point Blanco" which was the land claimed by the plaintiffs and sued for in the suit; and that if it be shown in proof that the defendant Gill does in fact reside upon and has his improvements upon the island that lies due south from the outward extremity of "Point Blanco" and due east from lots 6 and 9 of Section 18 on the large island called "Cayo Costa," then it would be conclusive that he was not in possession of the land sued for in Section 8, and he should recover. And we held that all of these facts might be proved by witnesses testifying from personal observation in conjunction with the points of the compass, and that such evidence, irrespective of the official fieldnotes of the government survey, would be legitimate and proper, and would in no wise tend to impeach or vary

the government survey or plat, but would tend to verify its accuracy. All of the evidence admitted at the last trial and forming the basis of these assignments of error tend towards establishing the above facts and does overwhelmingly establish the fact that the land upon which the defendant Gill has his possessions does lie south from Point Blanco and due east of and not more than a half mile from Section 18 on "Cayo Costa," and that therefore it must necessarily be in Section 17, and cannot be in Section 8 which lies over a mile farther north, the latter being the land claimed by the plaintiffs and sued for. The refusal to give certain instructions requested by the plaintiffs, and the giving of other instructions are also assigned as error. Under the proofs in the case the trial could not properly have resulted in any other way than it did result, regardless of instructions or their propriety or impropriety, therefore it becomes unnecessary to consider these assignments predicated thereon.

76 The judgment of the court below in said cause is hereby affirmed at the cost of the plaintiffs in error.

Hooker and Parkhill, JJ., concur.

Shackleford, C. J., and Cockrell and Whitfield, JJ., concur in the opinion.

77 On the 11th day of December, 1908, judgment was rendered by the Supreme Court of Florida in said cause in the words and figures following:

Supreme Court of Florida, June Term, A. D. 1908.

J. M. GRAHAM and B. F. HAMPTON, Plaintiffs in Error,

v.

CHARLES H. GILL, Defendant in Error.

Upon a Writ of Error to a Judgment of the Circuit Court within and for the County of Lee.

This cause having been submitted to the court at a previous term thereof upon a transcript of the record of the judgment aforesaid and the argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed; and it is further ordered that the defendant in error do recover of the plaintiffs in error his costs by him in this behalf expended, which costs are taxed at the sum of — dollars; all of which is ordered to be certified to the court below.

The opinion of the court in this cause was this day read by Mr. Justice Taylor and ordered to be filed.

78 On the 5th day of January, 1909, the plaintiffs in error filed their petition for a rehearing in said cause in the words and figures as follows:

In the Supreme Court of Florida.

J. M. GRAHAM and B. F. HAMPTON, Plaintiffs in Error,
vs.
CHAS. H. GILL, Defendant in Error.

To the Honorable Justices of said Court:

The petition of J. M. Graham and B. F. Hampton, Plaintiffs in Error, in the foregoing cause, respectfully represent unto the Court that this honorable court on the 10th day of December, 1908, rendered a decision affirming the judgment of the Circuit Court rendered in said cause, and your petitioners feel aggrieved by reason of said decision, and hereby apply for a rehearing alleging that this honorable court overlooked and did not duly consider certain portions of the testimony in said cause, upon the following grounds, which are herewith alleged as a basis for said rehearing, to-wit:

First. Your petitioners allege that this honorable court failed to give due weight to the undisputed fact that the plaintiffs purchased lot one of section eight, township forty-four, South Range twenty-two East according to a survey and plat adopted and established by the United States, and likewise the defendant homesteaded lot two section seventeen same township, and that according to the official plat the point referred to in the opinion of this court as "Point Blanco," is south of Palmetto Key, (or Sec. 8) the land sold to the plaintiffs; whereas the opinion of the court, and the testimony of defendant, if relevant or admissible, places Palmetto Key in Section 17, same township.

79 Second. That according to the Act of Congress, as embodied in section 2396 Rev. Stat. of the U. S. the boundary line of section eight, "actually run and marked in the survey returned by the Surveyor General shall be established as the proper boundary lines of the sections," hence the refusal of this honorable court to adopt the line actually run and established by the United States as the line of said section 8, is a denial of plaintiffs' right under the United States statute.

Third. That this court failed to give due weight to the language of the patent under which the defendant took title to the land he claims, in that the patent contains a clause that the grantee accepts said conveyance, "According to the official plat of the survey of said land as returned by the Surveyor General to the General Land Office," which land according to said plat is south of Palmetto Key.

Fourth. That this honorable court failed to consider that official plat on file in the land office of the U. S. designates the homestead entry of the defendant specifically by number, as being south of "Palmetto Key" and that Palmetto Key is in section 8 and north

of lands which the government patented to defendant, but defendant is unlawfully in possession of plaintiffs' land in section eight.

Fifth. That said official plat under which defendant claims, and under which he accepted his entry, shows Palmetto Key to be embraced in the sale to the plaintiffs, and that this Palmetto Key is in section 8, although it is identified by the testimony of every witness for both parties as "Palmetto Key" or "Palmetto Island," the island on which defendant is living and has his improvements.

Sixth. That this honorable court overlooked the language of the patent and the Act of Congress under which both parties claim, in allowing the testimony of non-expert witnesses, to overcome the official plat and field notes of said survey, as positively identified and proved by the said field notes and actual surveys of them by competent surveyors.

Wherefore your petitioners pray that a rehearing be allowed and granted to these plaintiffs in error in accordance with law
80 and the rules of this court.

All of which is respectfully submitted.

HILTON S. HAMPTON,

F. C. ALDERMAN,

Attorneys for Plaintiffs in Error.

On the 8th day of January, 1909, the Supreme Court made the following order denying said petition for rehearing:

Supreme Court of Florida, June Term, A. D. 1908.

J. M. GRAHAM et al., Plaintiffs in Error,

v.

CHARLES H. GILL, Defendant in Error.

A petition for rehearing having been filed in this cause by counsel for the plaintiffs in error, and the court having duly considered the same, it is ordered that the said petition be and the same is hereby denied.

On the 19th day of April, 1909, a petition for writ of error to the Supreme Court of the United States and assignment of errors was filed by the plaintiffs in error in the words and figures following:

81

In the Supreme Court of Florida.

J. M. GRAHAM and B. F. HAMPTON, Plaintiffs in Error,

v.

CHARLES H. GILL, Defendant in Error.

Petition for Writ of Error, Assignment, and Prayer.

Considering themselves aggrieved by the final decision of the Supreme Court in affirming the judgment rendered against them by

the Circuit Court of Lee County, Florida, in the above entitled case, the plaintiffs hereby pray a writ of error from the said decision and judgment to the U. S. Supreme Court, and an order fixing the amount of a supersedeas bond.

And the said J. M. Graham and B. F. Hampton assign the following errors in the records and proceedings of the said case:

The Supreme Court of Florida erred in admitting in evidence the testimony of witnesses impeaching and contradicting the official government surveys, plats and field notes of the territory involved, and in admitting in evidence certain private coast charts tending to vary and contradict the official government land surveys, plats and field notes.

The title and right to certain lands held under grants and statutes of the United States was claimed by plaintiffs, and the decision of the Supreme Court of Florida denied the said title and right claimed by the plaintiffs under the said statutes of the United States.

The said errors are more particularly set forth as follows:

The Supreme Court of Florida erred in holding and deciding—

First. That testimony of witnesses was properly admitted in evidence to vary and contradict the official government land surveys, plats and field notes made in conformity with section 2396 of the Revised Statutes of the United States, the title of plaintiffs to the said land in question having been specially set up and claimed under the said official government land surveys, plats and field notes.

Second. That private coast charts or surveys were properly admitted in evidence to vary and contradict the official government land surveys, plats and field notes made in conformity with section 2396 of the Revised Statutes of the United States, the title of plaintiffs to the land in question *have* been specially set up and claimed under the said official government land surveys, plats and field notes.

For which errors the plaintiffs in error, J. M. Graham and B. F. Hampton, pray that the said judgment of the Supreme Court of the State of Florida, dated Jan'y 20, 1909, be reversed and a judgment rendered in favor of the plaintiffs in error J. M. Graham and B. F. Hampton and for costs.

HILTON S. HAMPTON,

Attorney for J. M. Graham and B. F. Hampton.

STATE OF FLORIDA,

Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by J. M. Graham and B. F. Hampton to Charles H. Gill, in the sum of — dollars; such bond when approved to act as a supersedeas.

Dated ———.

—————.

Endorsed: No Federal question appearing, the petition is denied. James B. Whitfield, Chief Justice of the Supreme Court of Florida. April 19, 1909.

83 I, M. H. Mabry, Clerk of the Supreme Court of the State of Florida do hereby certify that the foregoing pages numbered from one to — inclusive contain a true copy of the record and all the proceedings and a correct transcript of the record of the Judgment in the case of J. M. Graham and B. F. Hampton, plaintiffs in error, and Charles H. Gill, defendant in error as appears upon the files and records in my office.

I further certify that the plat designated as Coast Chart No. 175 accompanying this transcript of the record and proceedings is a correct copy of the plat transmitted to the Supreme Court of the State of Florida and referred to in the record as defendant's exhibit No. 3.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Supreme Court of Florida, at Tallahassee, the Capitol, this the ninth day of December, A. D. 1909.

[Seal Supreme Court of the State of Florida.]

M. H. MABRY,
Clerk Supreme Court, State of Florida.

84 In the Supreme Court of the United States.

No. —.

J. M. GRAHAM and B. F. HAMPTON, Plaintiffs in Error,
v.
CHARLES H. GILL, Defendant in Error.

Petition for Writ of Error, Assignment, and Prayer.

Considering themselves aggrieved by the final decision of the Supreme Court of Florida in affirming the judgment rendered against them by the Circuit Court of Lee County, Florida, in the above entitled case, the plaintiffs hereby pray a Writ of Error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

And the said J. M. Graham and B. F. Hampton assign the following errors in the records and proceedings of the said case:

The Supreme Court of Florida erred in admitting in evidence, over plaintiffs' objections, the testimony of witnesses impeaching and contradicting the official government surveys, plats and field notes of the territory involved, and in admitting in evidence certain private coast charts tending to vary and contradict the official government land surveys, plats and field notes.

The title and right to certain lands held under grants and statutes of the United States was claimed by plaintiffs, and the decision of the Supreme Court of Florida denied the said title and right claimed by the plaintiffs under the said statutes of the United States.

85 The said errors are more particularly set forth as follows:
The Supreme Court of Florida erred in holding and deciding:

First. That testimony of witnesses was properly admitted in evidence to vary and contradict the official government land surveys, plats and field notes made in conformity with Section 2396 of the Revised Statutes of the United States, the title of plaintiffs to the land in question having been specially set up and claimed under the said official government land surveys, plats and field notes.

Second. That private coast charts or surveys were properly admitted in evidence to vary and contradict the official government land surveys, plats and field notes made in conformity with Section 2396 of the Revised Statutes of the United States, the title of plaintiffs to the land in question having been specially set up and claimed under the said official government land surveys, plats and field notes.

Third. In sustaining the Court below in having refused charges requested by the plaintiff, viz., 4th, 5th and 6th, to the effect that both parties were bound as to the location of the boundary of their lands by the United States Government survey, made in accordance with Section 2396, Revised Statutes.

Fourth. In sustaining the Court below in giving at the request of the defendant, and upon objection by the plaintiff, the fifth charge, to the effect that the jury might consider all evidence which they should believe, introduced by the parties for and by which to fix the actual locations of the property in controversy, and in this connection might consider the testimony of witnesses testifying from personal knowledge and observation, of actual location, in connection with and in reference to the points of the compass.

Fifth. In that it sustained the Court below in overruling after verdict a motion to set aside said verdict upon the grounds
86 assigned in said motion.

For which errors the plaintiffs in error, J. M. Graham and B. F. Hampton, pray that the said judgment of the Supreme Court of the State of Florida, dated December 11, 1908, be reversed and a judgment rendered in favor of the plaintiffs in error, J. M. Graham and B. F. Hampton, and for costs.

HILARY A. HERBERT,
BENJAMIN MICOU,
RICHARD P. WHITELEY,

Counsel for J. M. Graham and B. F. Hampton.

87 WASHINGTON,
District of Columbia:

Supreme Court of the United States.

Let the Writ of Error issue upon the execution of a bond by J. M. Graham and B. F. Hampton to Charles H. Gill, in the sum of five hundred dollars.

EDWARD D. WHITE,
*Associate Justice Supreme Court
of the United States.*

Dated: Nov. 12, 1909.

88 Know all men by these presents, That we, J. M. Graham and B. F. Hampton and National Surety Company of New York, N. Y. are held and firmly bound unto Charles H. Gill in the full and just sum of Five Hundred dollars, to be paid to the said Charles H. Gill, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this Twenty-fifth day of June, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a term of the Supreme Court of Florida in a suit depending in said Court, between J. M. Graham and B. F. Hampton, Plaintiffs and Charles H. Gill, defendant, a judgment was rendered against the said J. M. Graham and B. F. Hampton and the said J. M. Graham and B. F. Hampton having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles H. Gill citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said J. M. Graham and B. F. Hampton shall prosecute said writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

J. M. GRAHAM AND
B. F. HAMPTON,

By HERBERT & MICO, *Att'ys in Fact*,
NATIONAL SURETY COMPANY,
By W. H. RONSAVILLE.

[SEAL.]

[SEAL.]

[SEAL.]

[SEAL.]

Sealed and delivered in the presence of—

J. P. TIEKEEEN.
M. McCORMICK.
WM. M. DEVING.

Approved by

EDWARD D. WHITE,
*Associate Justice of the Supreme
Court of the United States.*

Endorsed: Filed Nov. 18, 1909. M. H. Mabry, Clerk Supreme Court of Florida.

89 I. M. H. Mabry, Clerk of the Supreme Court of the State of Florida do hereby certify that the foregoing is a true copy of the original bond of the plaintiffs in error on the writ of error in this cause filed in the office of the Clerk of the Supreme Court of the State of Florida, on the 18th day of November, A. D. 1909.

Witness my hand and official seal this 9th day of December, A. D. 1909.

[Seal Supreme Court of the State of Florida.]

M. H. MABRY,
Clerk Supreme Court, State of Florida.

90 UNITED STATES OF AMERICA, ss:

To Charles H. Gill, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Florida wherein J. M. Graham and B. F. Hampton are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Associate Justice of the Supreme Court of the United States, this twelfth day of November, in the year of our Lord one thousand nine hundred and nine.

(Signed)

EDWARD D. WHITE,
*Associate Justice of the Supreme Court
of the United States.*

91 On this 19th day of November, in the year of our Lord one thousand nine hundred and nine, personally appeared Guy Howard, Deputy Sheriff in and for De Soto County, Florida, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Charles H. Gill.

GUY HARWARD.

Sworn to and subscribed the 19th day of November, A. D. 1909.

[Seal County Judge, De Soto County, Florida.]

R. E. BROWN,
County Judge, De Soto County, Florida.

92 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between

J. M. Graham and B. F. Hampton, plaintiffs in error, and Charles H. Gill, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn

in question the construction of a clause of the constitution,
 93 or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twelfth day of November, in the year of our Lord one thousand nine hundred and nine.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

EDWARD D. WHITE,

*Associate Justice of the Supreme Court
of the United States.*

94 [Endorsed:] Filed Nov. 18, 1909. M. H. Mabry, Clerk Supreme Court.

95 UNITED STATES OF AMERICA:

Supreme Court of the State of Florida.

In obedience to the commands of the within writ of error I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings of the within entitled case with all things concerning the same.

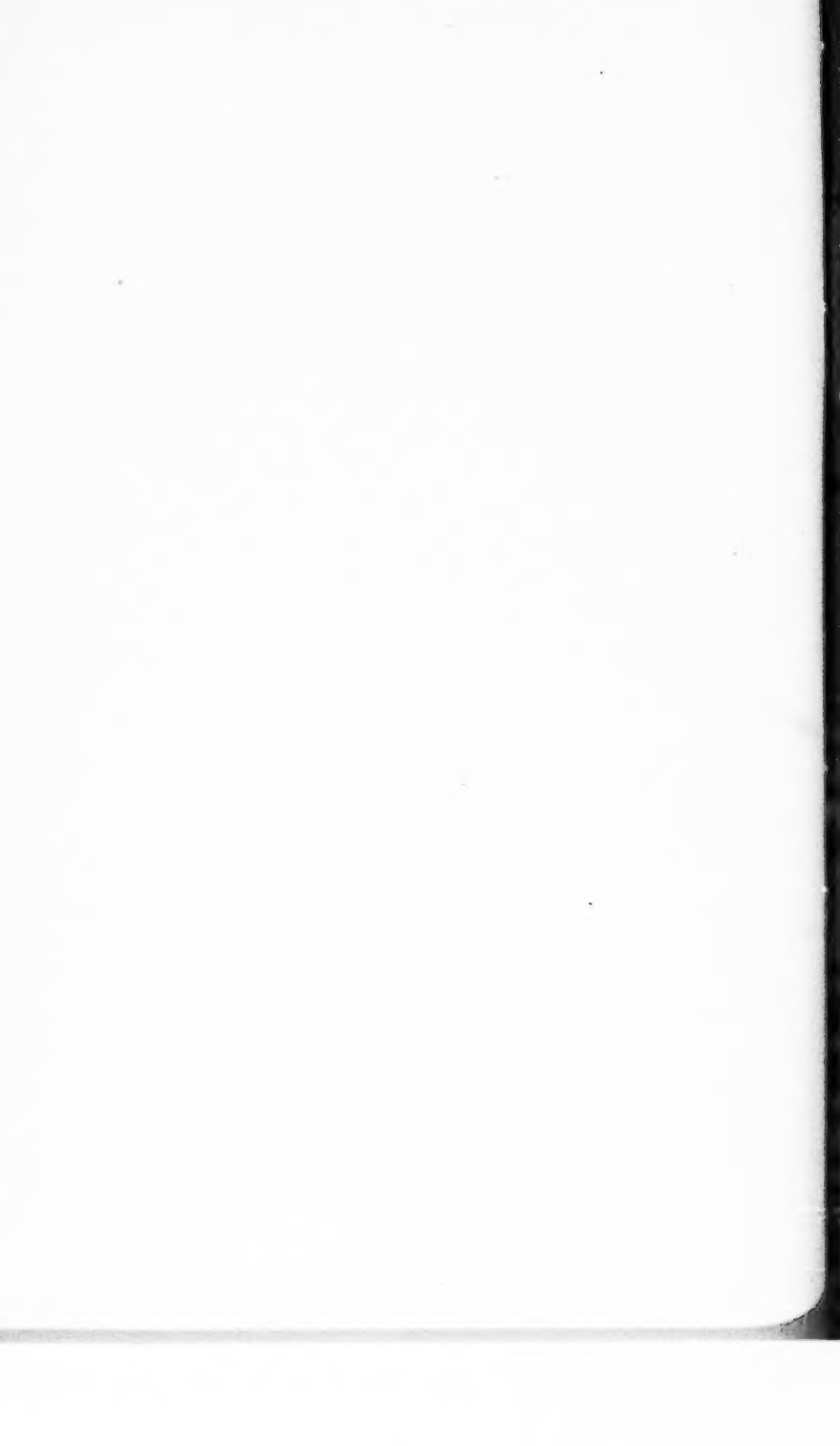
In witness whereof I hereunto subscribe my name and affix the

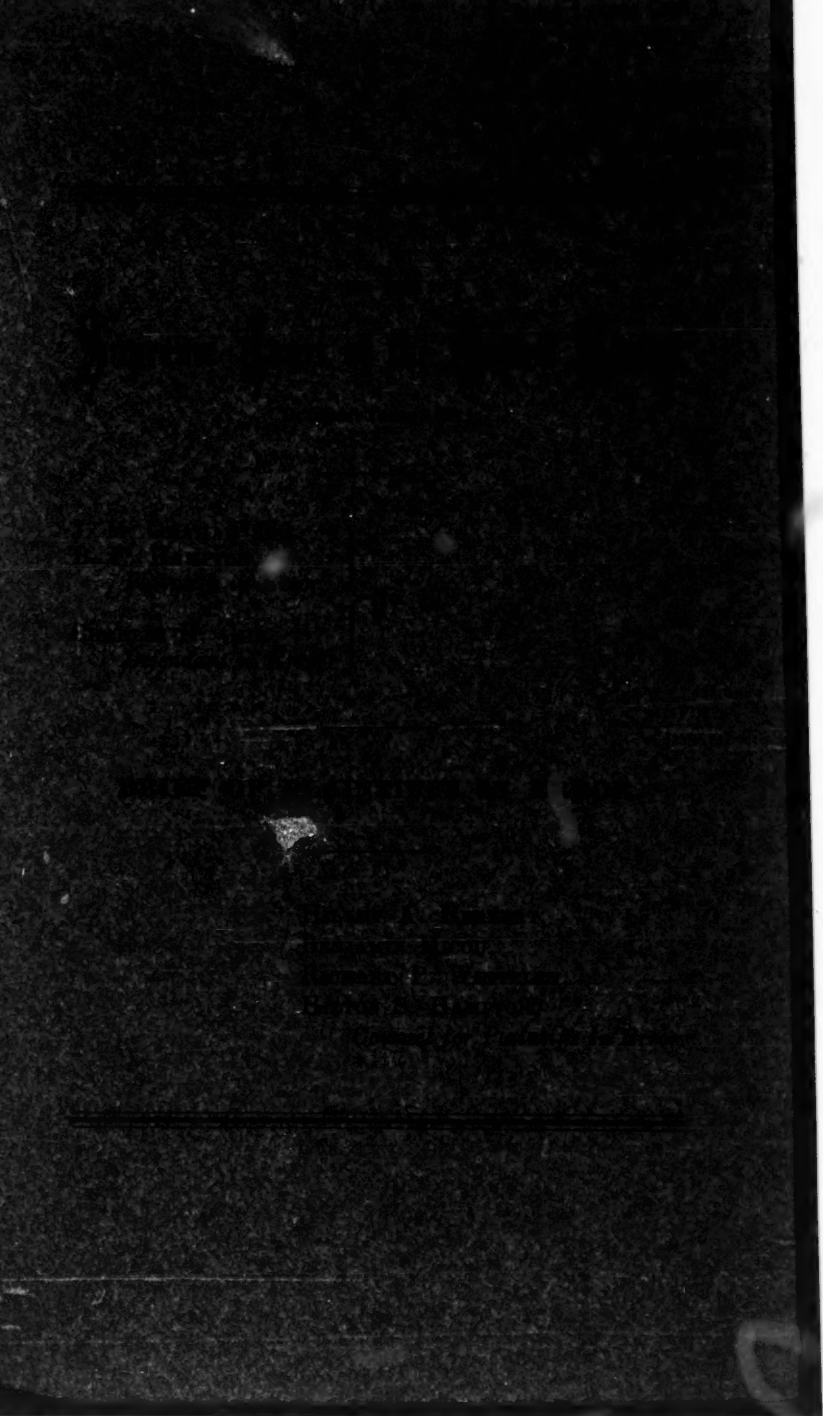
seal of the Supreme Court of the State of Florida, this 9th day of December, A. D. 1909.

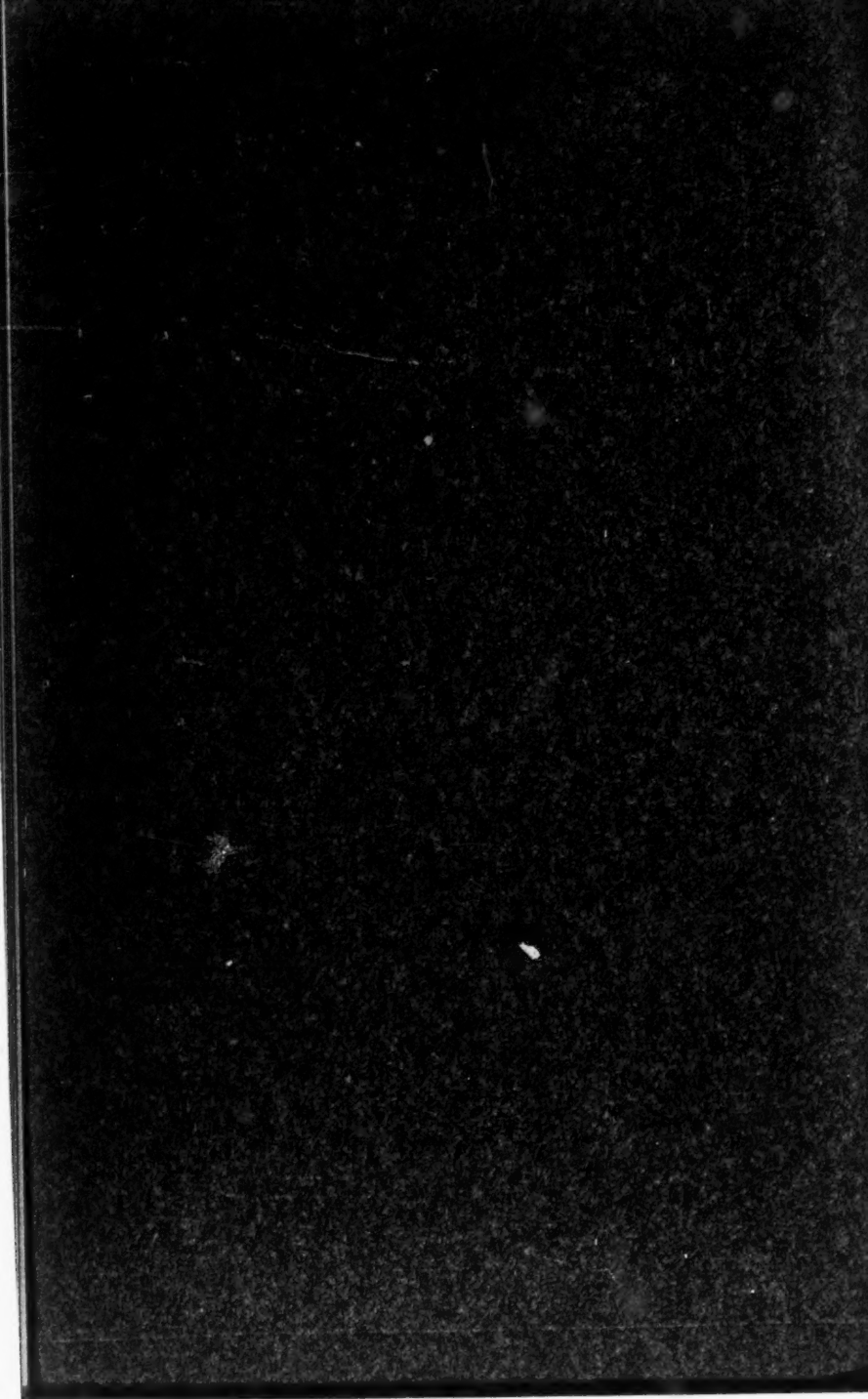
[Seal Supreme Court of the State of Florida.]

M. H. MABRY,
*Clerk of the Supreme Court of the
State of Florida.*

Endorsed on cover: File No. 21,931. Florida Supreme Court. Term No. 705. J. M. Graham and B. F. Hampton, plaintiffs in error, vs. Charles H. Gill. Filed December 15th, 1909. File No. 21,931.







IN THE
Supreme Court of the United States.

October Term, 1911.

J. M. GRAHAM and B. F. HAMPTON, <i>Plaintiffs in Error,</i> <i>v.</i> CHARLES H. GILL, <i>Defendant in Error.</i>	}	No. 173.
--	---	----------

BRIEF OF PLAINTIFFS IN ERROR.

Statement.

The case comes from the Supreme Court of Florida on a writ of error issued by this court (p. 59, Rec.).

The plaintiffs in error here, J. M. Graham and B. F. Hampton, were plaintiffs in an action of ejectment against Charles H. Gill, defendant in error here.

The action was brought in the Circuit Court for Lee County, Florida, for the recovery of Lot 1, Sec. 8, Tp. 44 S., Range 21 E.

The plaintiffs in error claimed title by a deed of October 23, 1900, from the State of Florida, the State's title being derived by virtue of the approval by the United States of the land to the State as school indemnity land, April 20, 1891 (pp. 5-6, Rec.).

The defendant made no claim to Lot 1, Sec. 8, but claimed title by a patent direct from the United States to

Lot 2, Sec. 17, of the same township and range in which is Lot 1, Sec. 8.

If the defendant was occupying Lot 1, Sec. 8, plaintiff was entitled to recover. If the defendant was not on this lot, then he was not on the land plaintiffs claim, and plaintiffs could not recover.

The plaintiffs lost in the trial court, and appealed to the Supreme Court.

The federal question involved came before the higher court through that court's review, upon proper objections made, of the proceedings of the trial court.

We will therefore first consider the proceedings had in the trial court.

The Right Specially Set Up Under the Federal Statute and the Decision Against Said Right.

We base our claim to the jurisdiction of this court upon the following facts:

1. "That the judicial power of the United States States extends to all cases in law * * * arising under the laws of the United States." Constitution, Art. 3, Sec. 2.

And the following from the jurisdictional act, Sec. 709, R. S.:

2. "Or where any right, title, privilege or immunity is claimed under * * * any * * * statute of * * * the United States, and the decision is against the right, title, privilege or immunity specially set up or claimed by either party under such * * * statute."

The land plaintiffs claimed, and established title to, Lot 1, Sec. 8, was approved to the State of Florida according to the recognized United States government

survey of the township in which said land was situated, and conveyed by the State to the plaintiffs according to that survey (pp. 5-6, Rec., and plaintiffs' Exhibits 3 and 4, at p. 6).

Likewise the land, Lot 2, Sec. 17, same township and range, that the defendant claimed and established title to by patent from the United States was conveyed according to the same survey.

Defendant's patent under which he accepted the grant reads:

"according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor-General." (p. 26, Rec.)

Each party, though claiming a different, claimed a specifically prescribed, sub-division of the public lands, and in determining the boundary and contents of the sub-division claimed, and to which title was established, each party was equally bound by the recognized government survey.

A federal statute, Sec. 2396, R. S., provides how the boundaries and contents of sections and sub-divisions of sections of the public lands shall be ascertained.

In the trial court plaintiffs in error here proved where the boundary was and what was the contents of the land they claimed, viz., of Lot 1, Sec. 8, strictly in accordance with the requirements of this federal statute.

After they had done this, the trial court permitted the defendant in error to offer evidence, entirely at variance with the provisions laid down in the federal statute for ascertaining the boundary and contents of sections and sub-divisions of sections of the public lands, to show that the land he was on was not Lot 1, Sec. 8, but was Lot 2, Sec. 17, the land to which he had a title. Objection to this was made by plaintiffs in error in a proper manner and at the proper time, and overruled.

This was a denial by the trial court of the right set up and claimed by plaintiff in error under the federal statute.

On appeal the action of the trial court overruling these objections was argued before, considered by, and passed upon, by the Supreme Court of Florida, and sustained by that court. This was the decision by the highest court in the State against the right specially set up and claimed by the plaintiffs in error to have the boundaries and contents of their land ascertained in accordance with the provisions of the federal statute.

The federal statute involved, Sec. 2396, R. S., quoted in full in the note below,* provides:

“The boundaries and contents of the several sections, half-sections and quarter-sections of the public lands shall be ascertained in conformity with the following principles:”

Then it is provided—

First. How the corners marked in surveys returned by

*SEC. 2396. The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:

First. All the corners marked with the surveys, returned by the surveyor-general, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter-sections, not marked on the surveys, shall be placed as nearly as possible equi-distant from two corners which stand on the same line.

Second. The boundary-lines, actually run and marked in the surveys returned by the surveyor-general, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary-lines which have not been actually run and marked

the Surveyor-General shall be established as the proper corners of the sections or sub-divisions of sections which they designate; and how the corners of half and quarter sections not marked on the surveys shall be placed.

Then it is provided—

Second. That the boundary lines returned by the Surveyor-General actually run and marked shall be the proper boundary lines for which they are intended, and that the length of such lines so returned shall be considered as the true length, and how boundary lines which have not been actually run and marked shall be ascertained.

It is provided—

Third. That each section or sub-division of section the contents whereof have been returned by the Surveyor-General shall be held and considered as containing the exact quantity expressed in the returns, and that half and quarter sections the contents whereof shall not have been thus returned shall be held to contain the half and fourth part,

shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary-lines shall be ascertained by running from the established corners due north and south, or east and west lines, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional township.

Third. Each section or subdivision of section, the contents whereof have been returned by the surveyor-general, shall be held and considered as containing the exact quantity expressed in such return; and the half-sections and quarter-sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part.

respectively, of the returned contents of the section. Palmetto Key, the land in controversy, was returned by the Surveyor-General, he having marked Palmetto Key on the plat of his survey and designated it thereon as Lot 1, Sec. 8.

The plaintiff in error introduced on the trial a plat showing Lot 1, Sec. 8, Tp. 44 S., R. 21 East, the land in controversy, from the Register of the United States Land Office at Gainesville, Florida, certified to as a true and correct tracing of the original survey (Plaintiffs' Exhibit 3, pp. 5, 6, Rec.).

This plat shows an island designated as "Palmetto Key" to be Lot 1, Sec. 8, school scrip location, approved April 20, 1899, to which plaintiffs in error held a deed direct from the State of Florida. It also shows the location of Lot 2, Sec. 17, patented to defendant, Gill.

The plaintiffs in error also offered in evidence the certified copy of a plat from the General Land Office, Interior Department, showing Township 44 S., Range 21 E., on which map Palmetto Key, the land claimed by plaintiffs in error, is shown and designated as Lot 1, Sec. 8, and which also shows Lot 2, Sec. 17, the land patented to the defendant (Exhibit 4, p. 6, Rec.).

The plaintiffs in error then offered in evidence as Exhibit 5, pp. 7-12, Rec., a transcript of the field notes of the survey made of this township by the United States Government and properly certified to by the United States surveyor for the district of Florida (pp. 7-12, Rec.).

In this exhibit it was stated, near top of page 7 of the record:

"These notes show lines connecting Palmetto Key in Sec. 8 with the main land in Sec. 1. Also connection of small island in Sections 17 and 20 (this small island the map shows as Lot 2, Sec. 17, which was patented to Gill) with south end at Cayocosta, in Sec. 32. Unnecessary lines are omitted.

"Full lines on the plat show lines of survey as given; dotted lines to show contour of islands," etc.

The court can readily trace on the government survey of the township (Exhibit 4) the full lines commencing in Section 1 and running from island to island, until Juseffa Island is reached. From the south end of this island it can also trace the full line running west by a little south to Palmetto Key, the Lot 1, Sec. 8, in controversy. It can also trace from Cayo Costa a full line running northeast to the small island designated on the map as Lot 2, Sec. 17, which is the land patented to the defendant in error.

It will be seen (middle of p. 9, Rec.) from the government field notes that after running from the mainland in Sec. 1 to Juseffa Island, that Palmetto Key was located from said island in the following way:

"Beginning on Juseffa at point of triangulation to Palmetto Key, the flag bears S. $78^{\circ} 30'$ west. Running a base S. $40^{\circ} 30'$ E. 8.55 to the point from which the flag bears S. $83^{\circ} 30'$ W., giving a dist. of 65.93, locating flag in Sec. 8 with southing of 44.11 and easting of 7.22.

"Survey of Palmetto Key then in Sec. 8," etc.

It will likewise be seen (middle p. 11, Rec.) that the island designated as Lot 2, Sec. 17, from the government field notes, was located from Cayo Costa Island as follows:

"Beginning at meander corner of Sec. 18, 19, the point of triangulation to small island. The flag on island bears N. $58^{\circ} 15'$. Run a base line S. $6^{\circ} 30'$ W. 10.00 to a point from which the flag bears N. $46^{\circ} 15'$ E. giving a distance of 30.75 placing the flag in section 17 with northing of 16.18 and easting of 11.80.

"Survey of island.—Begin at flag, thence in Sec. 17 S. 41° E. 18.00."

Plaintiffs in error offered the testimony of two competent civil engineers, one Crumpton, attached to the office of the United States Engineering Department of that portion of Florida; the other a civil engineer for forty-five years. Both of these witnesses testified to having located Lot 1, Sec. 8, by starting from marked corners of the United States survey of the township, where there was a fixed government mark. Each had with him in making the survey, and referred to them, the official field notes of the government survey, in order to check up and verify his work, and each located sectionally Palmetto Key, occupied by the defendant, as being Lot 1, Sec. 8, the property purchased from the State by the plaintiffs in error, and found the property located exactly as shown on the government plat. They also made an examination of the contour of the island, finding it to conform with the contour as shown on the government plat (Crumpton, pp. 14-20, Rec.; Taylor, pp. 20-25, and p. 41, Rec.).

This was in strict accordance with the method prescribed by Sec. 2396, R. S. for ascertaining the boundary and contents of sub-divisions of sections of the public lands.

To enable the defendant in error here to show that the land he was on was not Lot 1, Sec. 8, the location of which plaintiffs in error had determined in the manner above stated, but that he was on Lot 2, Sec. 17, for which he had a patent direct from the Government, the court permitted the defendant to introduce evidence to establish the location of Lot 2, Sec. 17, entirely at variance with the principle prescribed in Sec. 2396 R. S. for ascertaining the boundaries and contents of sections or sub-divisions of sections of the public lands. This was allowed over repeated objections by the plaintiffs in error, that the evidence offered varied the government survey; that it sought to

change the accepted government survey and plat and that certain surveys offered, and admitted, were not made from any points that were marked in the original government survey, and were not made with reference to the government field notes.

This evidence naturally resulted in a failure to locate Lot 1, Sec. 8, where it was located by the government survey, and before the jury deprived the plaintiffs of their right to have the land they had acquired from the Government located according to where it had been ascertained to be by an official survey made in accordance with Sec. 2396, R. S. The right of the plaintiffs to what they had acquired rested upon locating their land in conformity with the government survey by which they had purchased.

The defendant, against the objections of plaintiffs, that the survey was not made from the government field notes and is a private survey, and that it sought to vary the government survey, allowed witness Leak to testify to having located Palmetto Key, marked on the government plat as Lot 1, Sec. 8, and occupied by the defendant, as being Lot 2, Sec. 17, concerning the making of which survey the witness said:

"The point at which I began is not shown here on exhibit No. 5 (the government field notes). I began on the upper end of Capitiva Island." (p. 29, Rec.)

Now, Capitiva Island is not a marked point at all on the government survey. Witness also says:

"I made two surveys down there and did not locate this (referring to the last survey, where he located Palmetto Key as Lot 2, Sec. 17) according to the field notes given here, only part of them." (p. 29, Rec.)

Further on (p. 29) he said:

" I followed the government field notes as long as practical."

This witness admitted he had previously made a survey for plaintiffs that time, starting from a known government mark and going by the official field notes from which the Land Office map had been made, and by so doing located Palmetto Key as Lot 1, Sec. 8,—plaintiff's land. In other words, just where the other two surveyors had located it (pp. 29-34; 40-41, Rec.).

The court then permitted a Coast and Geodetic Survey map of Charlotte Harbor to be admitted in evidence, showing the Florida coast from St. Carlos Bay and including Charlotte Harbor (pp. 33-34, Rec.). This chart was, as its name indicates, " B. a map of the harbor, showing the depth of the water." It had no connection in the least with section lines and was not made with reference to the same (p. 35, Rec.). Objection was made to its introduction, on the ground that it referred only to the location of channels and had no reference whatever to land titles, and because it sought to change the accepted government survey and plats (pp. 34-40, Rec.).

After admitting this map the court then permitted a number of witnesses to testify as to the direction of Palmetto Key from Point Blanco, a projection from the mainland shown upon the Coast and Geodetic Survey map, but not an established mark of any kind, or even named on the government survey that had been made by the Land Office. Demere, p. 34; Corsa, pp. 36-37; Johnson, pp. 37-38; McAdow, pp. 38-39; Ware, pp. 39-40, Rec. This to establish that Palmetto Key was in Sec. 17 and not in Sec. 8.

On the Coast and Geodetic Survey Point Blanco is marked as a projection from La Costa Island, a little north by a little east of Palmetto Island, Palmetto Island

being on that map a little south by west of this point. On the government survey of this township there is no point put down and marked anywhere as Point Blanco, but as there appears to be a point, not marked, a little south by west from Palmetto Key, this point defendant in error assumed to be Point Blanco. Point Blanco, not being a marked point of any sort in the United States Government survey, or even named on it, its location is immaterial as use for determining a sectional location of any property shown on this Land Office survey. The Coast and Geodetic Survey map was not made under the provisions of Sec. 2396, R. S. and would under no circumstances be admissible to determine the location of Lot 1, Sec. 8.

We will say, though, that while Point Blanco may not be shown in the same place on the two maps, Palmetto Key, the land in question, and Juseffa Island, on which is a fixed government mark in the original survey from the mainland to Palmetto Key, are shown relatively in the same position towards each other on both maps.

There was also admitted the testimony of witnesses, not surveyors, and who made no pretense of familiarity with any survey, that they knew where Gill lived, and that he lived on Lot 2, Sec. 17. Gill, p. 26; Johnson, p. 37; McAdow, p. 38; Ware, p. 39, Rec.

As already stated, proper exceptions to all this evidence as inadmissible to vary and change the accepted government survey were made when the evidence was offered. In addition, when the evidence was all closed and before instructions were given to the jury, counsel moved to strike out

“all the testimony as to the existence of Palmetto Island in Sec. 17, and moves the court to instruct a verdict for the plaintiffs. 1st. Because the undisputed evidence shows that the island in controversy

has been successively located by two or more surveys, the first an original survey locating and platting the island in Sec. 8. 2d. Because the only evidence introduced to show any physical identification is contrary to the government survey and is admitted to be that of a private survey. 3d. Because the admitted evidence in this case shows that there is only one Palmetto Island on which the defendant Gill is living, and the testimony of witnesses familiar with the locality, no more than a private survey can be introduced to impeach the government survey." pp. 41-42, Rec.

To put it plainly. After these plaintiffs had acquired from the Government Palmetto Key, which the Government, by an official survey authorized by an act of Congress, had determined to be Lot 1, Sec. 8, and had made a plat of the township showing this location of Palmetto Key, the court allowed Lot 1, Sec. 8, to be sworn out into the sea by the testimony of a surveyor who makes a private survey, without regard to the government field notes, and who admitted that he found Palmetto Key to be Lot 1, Sec. 8. in a previous survey that he made when he went by those notes, and by the testimony of witnesses who undertook to fix the direction of the island from Point Blanco, an unknown point on or for the purpose of fixing any location in the Land Office survey, and by the opinion of bystanders, not surveyors, and professing no knowledge of any survey, that they knew the island on which the defendant lived to be Lot 2, Sec. 17.

It is too plain for argument that the authorized survey of public lands by Congress can not be thus set aside, either by private surveys made without regard to the government marks, or by the say-so of neighbors, based on no firmer expert knowledge than friendship or sympathy.

The conclusiveness of surveys of the public lands made under authority of Congress, as between individuals, has long been established by the decisions of this court.

Whitaker v. McBride, 187 U. S. 512; .

Russell v. Maxwell Land Grant Co., 158 U. S. 258;

Stoneroad v. Stoneroad, 158 U. S. 251-252.

We may add, that the Florida decisions are entirely in accord with the decisions of this court above referred to, as will be seen from the following cases:

"The survey actually made by the United States Government, and according to which it sold the land, controls as between parties to an action of ejectment."

Head note, *Miller v. White*, 23 Fla., 301, 307.

"Where a line was actually run and a division made in an original survey of land by the United States Government, and the line of division was marked by corners or natural objects, and such survey be established in accordance with the United States field notes, the grantee in a patent from the Government will take according to such actual survey, notwithstanding any mistaken description as to courses and distances or the quantity of land stated to be conveyed.

"When a law of Congress provides for the disposal of the public lands upon the ascertainment of certain facts by the officers in the United States land department, a patent issued from such department is a conclusive declaration of such officers, in collateral proceedings, of a finding of the facts authorizing the grant; but this principle of construction will not permit such officers in granting lands according to an actual survey of the United States to divide the lands as to quantity otherwise than was done by the actual survey, and where there is a conflict between the quantity expressed in the patent and that shown by the actual survey established the latter will control."

Stonewall Phosphate Co. v. Peyton, 39 Fla. 726.

In this last case the United States statute in controversy was Sec. 2396, the same section in controversy here.

A decision from California, holds that an approved survey is conclusive and must prevail whether right or wrong:

"Defendants, however, at the trial and on the motion for a new trial, contended: 1. That the theory of the plaintiff is incorrect as a matter of fact, and 2, That the government survey has fixed the lines of demarcation and situation of the hotels and buildings, and that as thus established under the approved survey they are all in the northeast quarter of the section; and that such approved survey is conclusive and must prevail, whether right or wrong, and that to admit evidence to the contrary was wrong.

"How, then, stands the case? Defendant was the owner of a house and out-buildings known as the Geyser Hotel. The approved official plat of the Government of the United States showed this property to be upon the northeast quarter of Section 13, with the line of demarcation between this and the southeast quarter of the section plainly laid down, and running south of the premises owned by her.

"She purchased the northeast quarter of the section. Plaintiff's grantor subsequently purchased from the Government the southeast quarter, and the patent refers to the same plat and surveys according to it, as hereinbefore mentioned.

"Under such circumstances, we are of opinion that the line designated upon the plat, and running south of defendant's hotel, whether accurate or not, is to be deemed and taken as the true division line between the north and southeast quarters of Section 13, that and neither a private survey nor parol evidence was admissible to show that the line should in fact run north of defendant's hotel.

"1. It follows from this view that as plaintiff introduced in evidence the plat which together with the patent to the southeast quarter, established this

line and his northern boundary thereat, the motion for a nonsuit should have been granted.

"2. That the evidence of the private survey and the plat of Von Leitch, in contradistinction of the plats of the United States, were erroneously admitted."

Chapman v. Pollock, 70 Calif. 487.

As directly bearing upon denying plaintiffs to locate their lands according to the recognized government survey made in accordance with the requirements of Sec. 2396 R. S. being a denial of a right under a federal statute which would give this court jurisdiction to review the case, we cite the following:

"But the plaintiff insisted that, when a conflict began concerning this line and the title to this piece of land, the register and receiver heard the parties, and being by the two acts of Congress of May 8, 1822 (4 Stat. at Large, 700, 708), authorized to decide on such claims, they settled finally, then and forever, both the title *and location*, including the true southern boundary of the bakehouse lot.

"The State court does not seem to have concurred in this view, but allowed the parties before them and the jury to examine into the true line of the bakehouse lot on general principles; and it was settled against the plaintiff, so as to cover by that lot what the defendants occupied. This course by the court certainly overruled the right set up under the supposed decision of those public officers of the United States concerning the title, and hence, so far as regards that ruling, the judgment is subject to our revision."

Doz, ex dem. Farmer's Heirs v. City of Mobile,
et al. 9 How. 468.

In a case in 1905, *Lavagnino v. Uhlig*, 198 U. S. 443, 451, the Supreme Court held that where the necessary effect of the ruling of the State court was to deny to a

locator of a mineral claim the protection of the relocation provisions of Sec. 2324, Rev. Stats., if that section justified the claim based upon it, or if the record shows that the trial court considered that the plaintiff specially claimed and was denied rights under Sec. 2324, Rev. Stats., authorizing an adverse of an application for a patent for mineral land, a federal question is involved and the motion to dismiss the writ of error will be denied.

Plaintiffs requested certain instructions to the jury which were directed to protecting their rights under Sec. 2396, R. S., which were refused by the court and properly excepted to, viz:

"4th. If the plaintiff in this case has introduced a map or plat prepared by the United States Surveyor-General for Florida showing that Lot 1 of Section 8 in Township forty-four (44) south of Range twenty-one (21) east, is on Palmetto Key, and if the Surveyor-General has certified that the map or plat so introduced is strictly conformable to the field notes of the survey thereof on file in his office, and that those field notes have been examined and approved, and if it is shown to you that the map or plat has been certified and approved by the Commissioner of the General Land Office then, the court charges you, that the map or plat is presumably correct and if both parties in this suit have derived title from the Government of the United States since said survey and the making of said plat they are bound by the same.

"5th. The court charges you that if the defendant claims title by patent as a homesteader to Lot 2 of Section 17, Township 44, Range 21, and if a map and plat certified to by the Register of the Land Office has been introduced showing that the land described in defendant's patent is not on Palmetto Key then the presumption is that the government did not intend to give defendant a homestead on Palmetto Key.

"6th. The survey actually made by the U. S.

whatever it may be, must control between the parties, and if you find that in order to place the land of defendant Gill in Sec. 17, Tp. 44 S., R. 21 E. you must find a variance with the U. S. Government, I charge you that you can not find for the defendant as he will not be allowed to thus indirectly attack the validity of the official survey." (p. 43, Rec.)

The court, at the request of the defendant, gave an instruction, and at its own suggestion another instruction, to which proper objections were reserved, which directly authorized the jury to determine the location of the land sued for by methods other than those prescribed in Sec. 2396, R. S. for ascertaining the boundary and contents of sub-divisions of the public lands, as follows:

"5th. In locating the properties in controversy and in determining the issue in this case, you may consider all the evidence, which you shall believe, introduced by the parties hereto, from and by which you may fix the actual locations thereof, and in this connection you may consider the testimony of witnesses testifying from personal knowledge and observation of actual location, in connection with and with reference to the points of the compass." (pp. 43-44, Rec.)

"Find your verdict from the facts as you believe them to have been established by the proof, without regard to any outside consideration whatever. In saying that the plaintiffs must show a better title than the defendant to the land in controversy, I refer to the description of the land as contained in the declaration. The question before you is, in regard to this particular is, who is the owner of lot 1, section 8, Tp. 44, R. 21. There is no discrepancy in the declaration describing the land as Palmetto Island or Palmetto Key, and you may consider any testimony offered as to the discrepitive by name of the land claimed by the plaintiff if it will assist you in any way in locating the land in contro-

versy, as described in the declaration the land is Lot 1 in section 8, Tp. 44, R. 21 S. & E." (p. 45, Rec.)

Objected to (p. 44, Rec.).

"Where a party to litigation in a State court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the State court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 293.

After verdict, a motion was made for a new trial (pp. 46, 47, Rec.) the assignment or grounds for which motion again raised before the court the errors we have just discussed. This motion was overruled (p. 47, Rec.). The case was then taken on bill of exceptions by appeal to the Supreme Court of Florida, where the points we have discussed were assigned as error (pp. 48, 49, Rec.).

From his assignment of errors and the record before the court showing the exceptions taken, there can be no doubt that the denial of the plaintiffs' right to have the boundary and contents of their land ascertained in the way prescribed by Sec. 2396, R. S., was not only before the highest court but was about the only thing before it.

In the brief of plaintiffs in error here, which was typewritten, not printed, in the Supreme Court of Florida, occurs the following direct reference to the right claimed under the statute:

“The boundary lines actually run and marked in the survey returned by the surveyor-general shall be established as the proper boundary lines for the sections and sub-divisions for which they are intended,”

“is the Federal statute on this subject as embodied in section 2396, Revised Statutes of the United States, relating to public lands.

“And no error embracing the lines can be corrected by any survey made by *individuals*, or under authority of an act of the State Legislature.”

“The government land having been so divided and patented by the number, the patent covers the land actually surveyed, whether the line runs straight according to law or not. The question in such case is *where* was the line originally run, *not* where it *ought* to have run.”

“Amer. & Eng. Encyc. of Law, Vol. 4, p. 774, and authorities therein cited.

“The survey *actually* made by the *United States Government* according to which it sold the lands, controls as *between* the *parties* in an action of *ejectment* covering said land.

“*Miller, et al. v. White*, 2 So. Rep. 614;

“*Stonevall Prosphate Co. v. Peyton*, 25 Sou. 440;

“*Tiedman on Real Property*, Sec. 596;

“*Hogg v. Lake*, 86 S. W. Rep. 614;

“*Lidden v. Hodnett*, 22 Fla. 465;

“*Washburn on Real Property*, Vol. 3, Sec. 203;

“*Chan v. Brandt*, 47 N. W. 741;

“*Beardley v. Crane*, 54 N. W. 741.”

The view expressed by the Supreme Court of Florida in its opinion shows clearly that the court understood that the question before it was that there had been evidence

admitted to vary the Government's survey and plat, for the court says:

"We do not think that any of it (the evidence) tends to contradict or vary the official government surveys or plats of the territory involved, but on the contrary its tendency is to verify and uphold such surveys and plats, and the evidence in the case overwhelmingly shows that the verdict and judgment in favor of the defendant below was proper."

(p. 50, Rec.)

This case has been twice to the Supreme Court of Florida, on the first trial in the lower court that court refused to admit testimony ascertaining the boundary and contents of this land which was at variance with the method for so doing that Congress had prescribed by Sec. 2396, R. S. This resulted in a verdict for plaintiffs in error here, and the defendant in error here appealed the case to the Supreme Court of Florida. That court held that the evidence had been improperly excluded, and reversed and remanded the case. *Gill v. Graham & Hampton*, 54 Fla. 257.

Therefore, on the second trial in the lower court, the one we have been discussing, the trial judge admitted this testimony and plaintiffs in error appealed, and again took the case to the Supreme Court of Florida. In the decision on that appeal, the one now under consideration, the Supreme Court, referring to its previous decision, said:

"And we held that all these facts might be proven by witnesses testifying from personal observation in conjunction with the points of the compass, and that such evidence, irrespective of the official field notes of the government survey would be legitimate and proper and would in no wise tend to impeach or vary the government survey or plat, but would tend to verify its accuracy."

(pp. 53-54, Rec.)

Here we merely cite this, not to discuss the correctness of the view expressed, but merely to show what question the court was passing upon.

After this decision, plaintiffs in error here then petitioned the Supreme Court of Florida for a rehearing (p. 55, Rec.). All the grounds upon which a rehearing was asked in effect set up a denial of plaintiff's right under this federal statute. We quote the second ground:

"Second. That according to the Act of Congress, as embodied in section 2396, Rev. Stat. of the U. S., the boundary line of section eight, 'actually run and marked in the survey returned by the Surveyor-General shall be established as the proper boundary lines of the sections,' hence the refusal of this honorable court to adopt the line actually run and established by the United States as the line of said section 8, is a denial of plaintiff's right under the United States statute."

(p. 55, Rec.)

This court has held that a federal right is specially set up or claimed in a State court so as to confer jurisdiction on this court of a writ of error to such court, where a claim of such right sufficiently appears in a motion for a new trial and in the assignments of error in the State court, and was fully considered and the decision adverse to the claim.

San Jose Land & Water Co. v. San Jose Ranch Co.
189 U. S. 177.

The Case on its Merits.

The errors assigned before the Supreme Court of Florida were as follows:

- 1st. Because the said verdict is contrary to the evidence.
- 2d. Because the court erred in overruling motion for new trial of plaintiffs.



Microcard Editions

An Indian Head Company

A Division of Information Handling Services

CARD 2

3d. Because the court erred in allowing the question to witness Gill on page 11 as to whether or not he was living on the land the patent called for.

4th. Because the court erred in allowing over objection of plaintiffs the testimony as to a second private survey by the witness R. B. Leak.

5th. Because the court erred in allowing in evidence the plat or the coast chart as defendant's Exhibit No. 3.

6th. Because the court erred in refusing to strike the testimony of the witness Demere.

7th. Because the court erred in refusing to strike the testimony of witness Corsa.

8th. Because the court erred in refusing to strike the testimony of the witness M. Johnson.

9th. Because the court erred in refusing to strike the testimony of McAdow.

10th. Because the court erred in refusing to strike the testimony of the witness H. A. Ware.

11th. Because the court erred in refusing to strike the testimony of the witness Leake on page 34.

12th. Because the court erred in refusing to submit to the jury the instructions designated in the motion for new trial.

13th. Because the court erred in giving to the jury the instructions objected to by plaintiffs and designated in the motion for new trial. (pp. 48-49, Rec.)

As to the 1st and 2d assignments of error, viz., that the verdict was contrary to the evidence, and that the motion for a new trial was overruled, we will discuss these together.

Both parties in the cause claimed title from a common grantor, the United States, and accepted their conveyances according to the original United States survey and the government plat made therefrom, and both were equally bound by that survey.

All the evidence before the jury which was properly admissible,—the plat itself, and every survey that was made starting from a recognized government mark in the original survey, and verified by the field notes of that survey,—showed that the land plaintiffs had acquired, and had a good title to, was the land that the defendant was occupying.

Crumpton surveyed from the corner of Sections 7 and 8, 17 and 18, a recognized government mark (p. 15, Rec.). He took in all the outlines of the island (Palmetto Key) and placed them sectionally (p. 16, Rec.). When he got to Palmetto Key he referred to the government notes to see if the triangulation made at the time of the original survey was correct, and located it sectionally (p. 17, Rec.). He is satisfied that the corner he started from was an established government marked corner of those four lots, viz., 7, 8, 17 and 18, and his survey fitted in with the government survey of township 44-21, in accordance with the contour and position of the island (p. 17, Rec.) He examined the Key to see the contour, drew a line clear around it and found that its area agreed with that given in the field notes (p. 28, Rec.).

The witness Taylor states that the field notes show, and that there is no question about it, that the Government located this island, Palmetto Key, from the mainland (p. 20, Rec.). The notes are in evidence and as quoted by us bear this fact out.

Now this witness in making his survey followed by the government field notes, the identical lines by which it is shown on the plat that Palmetto Key was reached from the mainland. He did not commence at the mainland, but he did commence at the north end of Juseffa Island which, according to the field notes, was a marked corner

in the government survey (p. 20, Rec.). He found the island in Sec. 8, and states:

“Standing on the south end of Juseffa Island, Palmetto Key is almost west, and there certainly can be no mistake about that.” (p. 20, Rec.)

The south end of Juseffa Island is in Sec. 9, and, according to the government survey, the section due west would be in Sec. 8.

Now, by the government plat, Lot 2, Sec. 17, is south of Lot 1, Sec. 8, and the witness states that he examined the country south of Sec. 8 and found in Sec. 17 a coral reef, by reason of which he could not get over there close to it. This reef is exposed at low tide. The original survey was made in 1875, and the witness states that at that time there might have been an island there, and that by the action of the tides and erosion that island might have been washed away in 1905, when this survey was made; and he gives his reasons for this statement (p. 21, Rec.).

We submit that because the island the defendant acquired by patent may have been washed away is no valid reason for his occupying plaintiffs' in the adjoining section.

This witness had also made a survey of all this land in Tp. 44, R. 21, in the year 1902, and described locating Palmetto Key then (pp. 22-23, Rec.), and he states that, according to the field notes, this island is in Sec. 8, Tp. 44, R. 21, and that if you will take these field notes and follow them from the mainland there and go straight, you will put that island in Sec. 8 sure (p. 23). He also states that, according to the plat, plaintiffs' Exhibit 3, Gill's island was in Sec. 17 (p. 24, Rec.). That the contour of the island in Sec. 17 is not the same as that on which Gill has his name; it is not the same as Pal-

metto Key at all. That it is not shown by the government field notes that it is necessary to go to Point Blanco to locate Palmetto Key, but that it is located from the mainland (p. 24, Rec.).

It has already been shown that Leak began the survey for the defendant, whereby he located Palmetto Key in Sec. 17, at a point on the upper end of Capitiva Island, not shown in the field notes, and only followed the government field notes as long as practicable (p. 29, Rec.). Such a survey clearly was not legal evidence of where Palmetto Key was according to the United States survey.

Independently of the fact that Leak did not start his second survey from a known government point there is another fact sufficient in itself to account for his not finding this island in Sec. 8. This survey was made about 1905, and he states he used a variation of $20^{\circ}40'$. Concerning this, Mr. Crumpton, a surveyor in the United States Engineer Office, who testified in 1908, says:

"I was employed by the Government at the time of this survey and I can state that the variation in Charlotte Harbor District is $1^{\circ}38'$ E, and it has been on the decrease nearly $3^{\circ}5'$ for the last eight or ten years. If a man should have used $2^{\circ}40'$ in 1905 it would not have been the correct variation. If a man applies the variation wrong, that is, used it positive when it should be negative in the case of a six-mile survey, like this was, it would place him a mile out of the way."

This witness had previously made a survey for the plaintiff. In that survey he started at a point known to him and which had always been taken, on Juseffa Island, as a government base, and, according to that point, surveyed from the government field notes, and from the lower end of Juseffa Island, and a triangle to the Key he found the Key in Sec. 8 (p. 31, Rec.).

On pages 31 and 32 of the record will be found the correspondence had between Leak and plaintiffs' counsel on this subject; also the testimony that he gave on the subject on the first trial of the case, showing that there he went by the field notes (p. 32) also, further down on page 32, he says he thinks he had the government survey with him, but later on, on page 40, he explains that when he testified it was fresh in his memory and whatever he testified to at that time is right (p. 40, Rec.). He also says:

" I testified this morning that in making one survey I located this island in Sec. 8 and subsequently at another survey, at which time I started at the end of Patricio Island, I located the same island in Sec. 17, which is correct; and each time I located the same island. I do not think my statement was that if Palmetto Key existed in Sec. 8 as I found it that there is no island in Sec. 17, and that if Palmetto Key existed in Sec. 17 the second time I found it there is no island in Sec. 8, but in making the survey I stated, ' if Juseffa Island was located in a certain section my survey from that island located Gill's island in Sec. 8.' " (p. 40.)

The only legal testimony to properly locate where the sub-division Lot 1, Sec. 8, was, as purchased by plaintiffs, was the testimony of the plat itself and the surveys made in conformity with the survey by which the Government platted this township. Every bit of that testimony showed that defendant was on plaintiffs' land, and a verdict for the defendant was contrary to the evidence. It was error, and the overruling of the motion for a new trial was error.

The Other Assignments of Error.

The remaining assignments of error fall naturally into two classes: Testimony admitted against plaintiffs' objec-

tions, and instructions given against their objections, or denied at their request.

We will first discuss

The Testimony.

The 3d, 6th, 7th, 8th, 9th and 10th assignments arise out of the objection to allowing the defendant Gill to testify that he was living on the land his patent called for, viz., Lot 2, Sec. 17 (p. 26, Rec.), and were objected to on the ground that it asked for an opinion, and that the government surveys and plats were the best evidence.

As to the 6th assignment. Demere, a boatman, was permitted to testify as to the direction of the island Gill lived on from Point Blanco (pp. 34-35, Rec.). Point Blanco is not a government marked point and is not named in the government survey. What is assumed to be intended for Point Blanco in the government survey is in a different location with reference to Palmetto Key from what Point Blanco is as shown on the Coast and Geodetic Survey map. This testimony, introduced for the purpose of trying to locate Palmetto Key in Section 17, was objected to because it varied the government survey.

Referring to the 7th assignment. Corsa, a pilot, was likewise allowed to testify as to the direction of this island from Point Blanco, and the same objection was made (pp. 36-37, Rec.).

Referring to the 8th assignment. Johnson, a real estate man, was also allowed to locate the island with reference to Point Blanco, and says:

"I should call that Palmetto Key. I say this from its location and the distance from Point Blanco. I base my judgment from the distance, and if that

plat says that Palmetto Key is east of Point Blanco or northeast of Point Blanco, the plat is wrong." p. 37, Rec.

He was also allowed to testify that he was certain that the coast surveys are correct and the land surveys incorrect (pp. 37-38, Rec.), to which the same objection was made.

As to the 9th assignment. The witness, McAdow, who lived on LaCosta Island, was allowed to locate Palmetto Key from its direction from Point Blanco, and to testify that Gill lived in Sec. 17; and similar objections were made to his testimony (pp. 38-39, Rec.).

As to the 10th assignment. Ware, who had a home on LaCosta Island, was allowed to testify that he was acquainted with the locality; that he knew where Gill lived and that he lived on Lot 2, Sec. 17, and to locate Palmetto Key and its direction from Point Blanco, and to swear that according to the Coast Survey map Gill lived in Sec. 17. This witness says he bases his opinion on his map. What his map is does not appear from the evidence. That according to his idea of the way this map (the Land Office map) lies it is wrong; and he is not a surveyor and has never surveyed these lands.

This testimony was objected to for the same reasons (p. 39).

It is too plain for argument that this sort of testimony can not be admitted to vary a recognized government survey, and in rebuttal to the expert testimony of surveyors who had followed the method prescribed by Sec. 2396, R. S., and the survey that the Government has made under authority of that section, and had verified their work by the government field notes. If such testimony were admissible for this purpose, why ever have a

government survey? and who could ever acquire a right by purchase according to such survey? These plaintiffs had a right to have the location of the land they had purchased determined in accordance with its location as surveyed under a federal statute and a denial to them of that right was a denial under the statute.

Assignments 4th and 11th relate to the testimony given by Leak, as to where he located the land by his second survey, wherein he did not start from any marked point on the government survey and did not follow the field notes of the government survey. This testimony has already been fully discussed.

The 5th assignment of error relates to the admission in evidence of the Coast Survey map.

It is clear that this was not admissible. To vary the recognized government survey, a map is offered, and objected to (pp. 33-34, Rec.) It is a Coast and Geodetic Survey map, designated "B. A map of the Harbor showing the depth of water." By the testimony of Crumpton (attached to the engineering department and employed by the Government at the time of these surveys) it is stated:

"This Exhibit No. 3 is a Coast chart representing Charlotte Harbor and other portions; this chart was used in my office to designate the depth of water and the harbors, though we have larger charts, more minute and on a larger scale. This chart has no connection in the least with section lines and is not made with reference to the same. It is a physical outline of the islands, channels and coasts, etc. In 1895 at the time this chart was made it showed the compass variations to be $2^{\circ} 20' E.$ " (p. 35, Rec.)

This map showed Point Blanco as northeast of Pal-

metto Key. It was offered as the basis for the testimony, already discussed, of witnesses who gave the direction of Palmetto Key for the purpose of trying to show that the Key was in Section 17 and not in Section 8.

This map should not have been offered at all, to vary the survey of the Land Office. By some subtle reasoning, all United States maps seem to have looked alike to the court, regardless of the purpose for which the maps were made. A map for the purpose of navigation and made without regard to sections at all could have no possible bearing upon a Land Office map made in accordance with Sec. 2396, R. S. and under no circumstances should have been admitted in evidence.

From an examination of the record it is clear that the whole purpose of Leak's second survey, of the offering of this chart, and of the testimony of witnesses having no knowledge of the government survey, who tried to locate Palmetto Key in Section 17, was ~~for no other purpose~~ ^{none other} than to vary the authorized government survey and to deny to the plaintiffs in error their right in this ejectment suit, to have the land they were suing for located according to the survey by which they had purchased; and this purpose can not be varied because the Supreme Court of Florida, in order to justify its decision, held that it did not think any of this evidence tended to contradict or vary the official government surveys or plats, but on the contrary its tendency was to verify and uphold such plats.

Government surveys made under a federal statute are conclusive. They need nothing extrinsic to the plat itself and the field notes (the official record of the survey) to verify or uphold them; and this case shows the hopeless chaos into which all land titles would fall if evidence such as was admitted here could be considered to vary

official surveys under the guise that it was not offered to vary but to verify and uphold.

Instructions.

Assignments 12th and 13th are, respectively, that the court erred in refusing to submit to the jury the instructions asked by plaintiffs in error, and in giving to the jury instructions objected to by the plaintiffs in error.

We have already quoted in the brief these instructions, and will here only say:

1st, as to instructions requested and refused: That the 4th, 5th and 6th instructions (p. 43, Rec.) were instructions absolutely correct as applicable to the law which governs this case, and in accordance with which the evidence that was objected to should have been excluded.

That the 5th instruction (pp. 43-44, Rec.) and the 2d instruction given by the court of its own motion (p. 45, Rec.) and objected to (p. 44, Rec.) the first of which instructions specially directed the jury that they might consider the testimony of witnesses testifying from personal knowledge and observation of actual locations, in connection with and with respect to the points of the compass; and the 2d instruction, that they might consider any testimony offered as to the descriptive by name of the land claimed by the plaintiffs, if it would assist them in any way in locating the land in controversy, etc., were both absolutely antagonistic to the settled principle that government surveys are conclusive, and that property located by them must stand and can not be differently located by methods varying from those the federal statute had provided for ascertaining such location.

The truth is, that the evidence and instructions herein

discussed as inadmissible and wrong, respectively, did, and had no other purpose than to mislead the jury and give it an excuse to find that the defendant was not on the land plaintiffs has purchased, when both plaintiffs and defendant had purchased under the same government survey and plat of that survey, by which both were bound, and a variance from which by either could change entirely the location of what either had purchased.

Respectfully submitted,

HILARY A. HERBERT,

BENJAMIN MICOU,

RICHARD P. WHITELEY,

HILTON S. HAMPTON,

Counsel for Plaintiffs in Error.

No. 173.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

Chief Justice Hall, A. C.
FILED.

FEB 27 1912

JAMES H. G. KENNEY

R. M. GRAHAM and B. F. HAMPTON, Plaintiffs in
Error.

CHARLES H. GILL, Defendant in Error.

WRIT OF HABEAS CORPUS IN ERROR.

JOHN W. BURTON,

Counsel for the Defendant in Error.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 705.

J. M. GRAHAM AND B. F. HAMPTON, PLAINTIFFS IN
— ERROR,

vs.

CHARLES H. GILL, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

The plaintiffs in error instituted an action of ejectment in the Circuit Court of Lee County, Florida, against the defendant in error for the recovery of lot 1 of section 8, township 44 south, range 21 east, containing about 84.42 acres, to which plaintiffs in error claimed title. The defendant in error filed a plea of "not guilty," which under the statutes and practice of Florida put in issue title to the premises; and also filed a special plea denying that he was in possession of

the land described in the declaration. The case was twice tried. On the first trial it resulted in a verdict for the plaintiffs, which on writ of error to the Supreme Court of Florida was reversed for errors of the trial court in refusing to permit the introduction of certain evidence offered by the defendant.

Gill *vs.* Graham & Hampton, 54 Fla., 259.

On the subsequent trial the jury found a verdict for the defendant. A judgment entered on this verdict was affirmed by the Supreme Court of Florida on writ of error taken thereto by the plaintiffs in error here, Graham & Hampton *vs.* Gill, 56 Fla., 316, and from that judgment of affirmance the present writ of error is sued out. An application was made to the Supreme Court of Florida for a writ of error, but the same was denied on the ground stated, that no Federal question appeared (Rec., p. 57). Subsequently a writ of error was allowed by a justice of this court.

ARGUMENT.

No Federal Question is Involved in This Case.

I.

If the fundamental basis of the contention of the plaintiffs in error be accepted as correct, namely, that a Federal question is here involved, it was not presented to or reached by the State court. It is expressly stated by the Chief Justice of the State court in his order denying a writ of error that no Federal question appeared. While this statement is not conclusive on this court, it must be accepted unless the record affirmatively shows the contrary.

The Supreme Court of Florida did not deal with the questions of evidence or instruction as presenting a Federal question.

John P. Mallett *et al.* *vs.* State of North Carolina,
181 U. S., 589-601.

The presentation of a Federal question in a petition for rehearing is insufficient to bring the question before this court, unless the State court entertained the petition and decided the Federal question there raised.

Loeber *vs.* Scroeder, 149 U. S., 580.

Sayward *vs.* Denny, 158 U. S., 183.

Prim *vs.* St. Louis, 165 U. S., 273.

Mallett *vs.* State of North Carolina, 181 U. S., 589.

In this cause the Supreme Court of Florida upon the petition for rehearing did not entertain the same or discuss and decide the question insisted on as being a Federal question, but merely denied the petition (Rec., p. 56).

The case of San Jose Land and Water Company *vs.* San Jose Ranch Company, relied upon by plaintiffs in error, is not in conflict herewith.

II.

No Federal Question.

In the trial of this cause before a jury there was in issue, under one plea, the title and under the other the possession of the premises. The property claimed by the plaintiffs is lot 1 of section 8, township 44 south, range 21 east, in Lee County, Florida, containing about 84.43 acres. The plaintiffs introduced evidence to establish that lot 1 of section 8 in the township and range mentioned was selected by the State of Florida as school indemnity lands, selection being approved on April 20, 1889 (Rec., p. 5), and that it was conveyed to them by deed from State Board of Education on October 23, 1899 (Rec., p. 6).

The defendant proved that he entered lot 2 of section 17 in the same township and range more than five (5) years prior to June 25, 1901, under the homestead laws of the United States (see admission of counsel for plaintiffs, Rec., p. 41), and that there was issued to him a patent for said lot 2 of section 17 by the Government on June 25, 1901 (Rec., p. 26).

The plaintiffs introduced in evidence a Government plat (Plaintiffs Exhibit No. 3, Rec., p. 8a) on which appears an island in section 8, designated "Palmetto Key," containing 84.42 acres, and another island in section 17, composed of two lots, one numbered 2, containing 98.72 acres, and marked Chas. H. Gill. The plaintiffs also introduced in evidence Government field notes of said township, from which it appeared that the island designated "Palmetto Key" was located in section 8 by a series of complicated surveys from the eastern boundary of the township, and that the

island in section 17, was located by surveys from the western boundary of the township. From this Government plat and these field notes introduced by the plaintiffs two distinct islands are located, one being claimed by the plaintiffs and the other by the defendant; that of the plaintiffs being northeast of lot 1 in section 15, called in the testimony of numerous witnesses "Point Blanco," and that in section 17 being south of the same defined point and east of lots 6 and 9 in section 18. The plaintiffs thereafter introduced evidence tending to establish that there was in fact only one island in that part of Charlotte harbor embraced in township 44, which necessarily involved the assertion that the Government plat and the field notes were erroneous in showing the location of their premises and that instead of owning an island 84.42 acres in area due east of section 7 and northeast of a well-defined point known as Point Blanco, as shown by the Government plat, they owned an island about 113 acres in area due east of section 18 and almost due south of Point Blanco, as shown on the Government plat; in fact the plaintiffs' contention would impeach and vary the entire western portion of the township.

There is and has been no contention that the defendant claimed title to or had possession of any land other than that described in his patent. All the evidence tends to establish the possession of the defendant on lot 2 of section 17, plainly designated on Government plat and located in relation to the western portion of the township as shown by field notes.

The testimony of the several witnesses produced for the purpose of establishing the location of the premises, without exception establish the island on which the defendant resided as being south of Point Blanco and east of section 18.

The effect of this testimony and of the evidence of the coast chart, which is proven by an expert witness to be exact as to identical locations, does not tend to vary, alter or impeach the Government plat and does not in any manner in-

terfere with a proper application and enforcement of section 2396, Revised Statutes of the United States.

The only effect of such testimony and evidence is the establishment of a fact.

Neither the jury nor the Supreme Court regarded the plaintiffs' evidence as sufficient to establish their contention, and in its opinion the court say: "Under the proofs in the case the trial could not properly have resulted in any other way than it did result, regardless of instructions or their propriety or impropriety. Therefore, it becomes unnecessary to consider the assignments predicated thereon" (Rec., p. 54).

What the Supreme Court held was that the evidence did not sustain the claim of the plaintiffs that the defendant was in possession of the premises described in the declaration and it is obvious that in passing on this question of the sufficiency of the evidence no Federal question was involved, hence there is nothing on which to found jurisdiction for review by this court.

Dower vs. Richards, 151 U. S., 658.

Moreland vs. Page, 20 Howard, 522.

Almonester vs. Kenton, 9 Howard, 1.

Gleason vs. White, 199 U. S., 54.

It having been admitted by plaintiffs that the defendant entered lot 2 of section 17; been established that the patent thereto was issued to him by the Federal Government; that he was in possession thereof; that said lot was properly located both on the Government plat and by Government field notes, a just and proper decision of the original cause may have been had without reference to other testimony or evidence. If, therefore, it could be said that the use of the coast chart or the testimony of witnesses over objection by the plaintiffs raised or involved a Federal question, it would still be insufficient to confer jurisdiction. For where the State court may properly dispose of a case without deciding

the Federal question, its judgment is not reviewable in the Supreme Court of the United States.

Clinger vs. Missouri, 13 Wall., 257.

The Case on Its Merits.

If it should be conceded that a Federal question is involved and properly raised and presented to this court so that it might take jurisdiction, that question would be ultimately resolved into whether the land entered as a homestead prior to June 25, 1896, was subject to selection and approval as school indemnity land in April, 1899. For if the evidence in this cause is sufficient to impeach rather than explain the Government plat and survey by referring to and fixing the present location of the islands platter and referred to therein, such impeachment would have to be by the evidence of the plaintiffs in order to entitle them to recover. Without it there appear to be two islands, one theirs and the other the defendant's. And if such impeachment should be sufficient to show conclusively that the island located on the plat as lot 1 of section 8, claimed by the plaintiffs, was in fact identical with the larger island located on the plat in sections 17 and 20, the northern portion of which is claimed by defendant, it must without question be determined that the defendant has the prior claim. The defendant's homestead entry segregated the land from the public domain and it was not subject to be thereafter selected as school indemnity land.

Hodges vs. Colcord, 193 U. S., 192.

Holt vs. Murphy, 207 U. S., 407.

When the defendant received his patent it related back to the date of his entry and it was also superior to the subsequently acquired claim arising from the State's selection and the approval thereof.

Weyerhauser vs. Hoyt, 219 U. S., 380.

Sjoli vs. Dreschel, 199 U. S., 564.

The legislation of Congress in regard to school land in Florida will be found set forth in the case of *State vs. Jennings*, 47 Fla., 307.

In its essence the claim of plaintiffs in error is that in their interest Dr. Jekyll is identical with Mr. Hyde, but against their interest, Mr. Hyde is not identical with Dr. Jekyll.

The writ of error should be dismissed, or if jurisdiction is retained, the judgment should be affirmed.

Respectfully submitted,

JOHN W. BURTON,
Counsel for the Defendant in Error.

223 U. S.

Opinion of the Court.

GRAHAM v. GILL.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 173. Submitted February 29, 1912.—Decided March 11, 1912.

Overruling objections to admission of evidence other than field notes of surveys is in effect passing on effect of the requirements of § 2396, Rev. Stat., and, in regard to surveys of public lands, involves a Federal question reviewable by this court under § 709, Rev. Stat.

Evidence other than field notes of a survey of public lands may be admissible if it has a legitimate tendency to precisely locate the land, even though it may tend to show an error in the field notes, and, under the circumstances of this case, such evidence was proper. *French-Glenn Live Stock Co. v. Stringer*, 185 U. S. 47.

56 Florida, 316, affirmed.

THE facts, which involve the admissibility under § 2396, Rev. Stat., of evidence other than field notes in regard to location of a tract of public land, are stated in the opinion.

Mr. Hilary A. Herbert, Mr. Benjamin Micou, Mr. Richard P. Whiteley and Mr. Hilton S. Hampion for plaintiff in error.

Mr. John W. Burton for defendant in error.

Memorandum opinion by direction of the court. By
MR. CHIEF JUSTICE WHITE.

Plaintiffs in error were plaintiffs below. The action was in ejectment. In brief, the controversy was this: An island in Charlotte Harbor, Florida, described on the plat of survey as lot 1, section 8, of a specified township and range, was certified in 1899 by the United States to the State of Florida as school indemnity lands, and on

October 23, 1900, was conveyed by the state board of education to the plaintiffs in error. The claim in the action was that the defendant wrongfully withheld possession of this tract. On the other hand the defendant averred that the land of which he was in possession was lot 2, section 17, of the same township and range, and that he made a homestead entry thereon in 1896 and received a patent therefor in 1901. A portion of the plat of survey showing the location of the respective tracts is contained in an opinion of the Supreme Court of the State of Florida, reversing a judgment for the plaintiffs entered on the first trial of the case, reported in 54 Florida, 259.

The tract sold to the plaintiffs in error was surveyed by continuing a survey made from land lying east of the tract. That of the defendant was surveyed by continuing a survey made from lands lying to west of the tract. By using the field notes of the respective surveys it would seem that the tract in possession of the defendant was the tract which had been conveyed to both parties.

On the second trial the defendant was allowed to introduce evidence of the physical location of his tract with reference to other land in the vicinity shown on the plat of survey, and such testimony in the opinion of the court below conclusively established that the tract in the possession of the defendant was in fact lot 2 of section 17 as delineated on the plat, according to which the land was patented to the defendant. There was a verdict and judgment on the second trial for the defendant, which was affirmed by the Supreme Court of the State. 56 Florida, 316.

It is insisted that the writ of error should be dismissed because no Federal question is involved. The contention, however, is without merit, since repeatedly during the trial the plaintiffs objected to the admission of all evidence bearing upon the location of the tract in controversy other than the field notes of the survey under which the

223 U. S.

Opinion of the Court.

plaintiffs claimed, which it was contended were the best and only evidence. In passing adversely on these objections the trial court did not merely determine the weight or sufficiency of the evidence to prove a fact, but passed on the competency and legal effect of the evidence as bearing upon the question of Federal law, viz., the effect of the requirements of § 2396, Rev. Stat., as to the mode of surveying public lands. Thus a Federal question was presented and decided. *Dower v. Richards*, 151 U. S. 658. See, also, *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 54.

Although, however, the Federal question was necessarily involved and decided, we are of opinion that under the circumstances of this case it comes directly within the rule announced in *French-Glenn Live Stock Co. v. Springer*, *supra*, and therefore the state court was right in holding that the defendant was not debarred from introducing evidence other than the field notes which had a legitimate tendency to identify the precise location of the tract occupied by him, although such evidence might tend to show a mistake in the field notes of the survey of the tract which the plaintiffs claimed. Indeed, considering the peculiar nature of the controversy we think it is true to say that the effect of the extrinsic evidence was in substance to support and not to contradict the plat with reference to which the tract was patented to the defendant.

The only Federal question presented by the record having been correctly adjudicated, it results that the judgment must be and it is

Affirmed.